(1) Supreme Court, U.S.
FILED
00 18 JUL 03 2000
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

J.W. BOOKER, WARDEN, PETITIONER

v.

JAMES WARD, JIMMY SCROGER, AND CHRISTOPHER LAMAR GUIDO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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137 pp

QUESTION PRESENTED

Whether the Bureau of Prisons may exercise its discretion under 18 U.S.C. 3621(e)(2)(B) to deny eligibility for early release from custody, based on the successful completion of a substance abuse treatment program, to the category of prisoners whose current offense is a felony that "involved the carrying, possession, or use of a firearm." 28 C.F.R. 550.58(a)(1)(vi)(B).

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of petitioner J.W. Booker, warden of the Federal Prison Camp at Leavenworth, Kansas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 202 F.3d 1249. The opinion of the district court in respondent Guido's case (App., *infra*, 19a-53a) is reported at 37 F. Supp. 2d 1289. The opinion of the district court in respondent Ward's case (App., *infra*, 54a-86a) is reported at 38 F. Supp. 2d 1258. The

opinion of the district court in respondent Scroger's case (App., *infra*, 87a-120a) is reported at 39 F. Supp. 2d 1296.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2000. A petition for rehearing was denied on April 4, 2000. (App., *infra*, 121a-122a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 3621(e) of Title 18 of the United States Code provides in relevant part:

> (2) Incentive for prisoners' successful completion of treatment program.—
>
> * * * * *
>
> (B) Period of custody.—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a [substance abuse] treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

2. Section 550.58(a)(1)(vi)(B) of Title 28 of the Code of Federal Regulations provides in relevant part:

> (a) *Additional early release criteria.* (1) As an exercise of the discretion vested in the Director of the Federal Bureau of Prisons, the following categories of inmates are not eligible for early release:
>
> * * * * *
>
> (vi) Inmates whose current offense is a felony:

* * * * *

(B) That involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device) * * * .

STATEMENT

Section 3621(e)(2)(B) of Title 18 provides that the Bureau of Prisons (BOP) may reduce by up to one year the prison term of a prisoner convicted of a nonviolent offense who successfully completes a substance abuse treatment program. Each respondent was denied eligibility for such early release under a BOP regulation, 28 C.F.R. 550.58(a)(1)(vi)(B), and BOP program statements because his current offense is a felony that involved the carrying, possession, or use of a firearm. The United States District Court for the District of Kansas granted their petitions for writs of habeas corpus and ordered BOP to reconsider each respondent's application for early release, without consideration of the fact that their sentences were enhanced because they possessed a firearm. App., *infra*, 53a, 86a, 119a. The court of appeals affirmed. *Id.* at 1a.

1. a. In 1994, Congress created an incentive for federal prisoners to participate in BOP's substance abuse treatment program.[1] Congress authorized BOP to reduce a prisoner's sentence up to one year based on

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[1] BOP's entire residential substance abuse treatment program consists of three components: (1) a 500-hour unit-based residential phase within the correctional institution; (2) a transitional phase likewise within the institution; and (3) a community-based transitional services phase, in a community corrections center or on home confinement. See BOP Program Statement 5330.10, CN-01, ch. 5, at 1 (May 17, 1996).

successful completion of such a treatment program. The statute provides, in relevant part:

> (2) Incentive for prisoners' successful completion of treatment program.—
>
> * * * * *
>
> (B) Period of custody.—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a [substance abuse] treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. 3621(e)(2)(B).

b. BOP issued a regulation interpreting Section 3621(e)(2)(B) to exclude from eligibility "inmate[s] [whose] current offense is determined to be a crime of violence as defined in 18 U.S.C. 924(c)(3)." 28 C.F.R. 550.58 (1995). Included in Section 924(c)(3)'s definition of "crime of violence" is an offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). BOP Program Statement 5162.02 provided that a drug trafficking conviction under 21 U.S.C. 841 or 846 would be considered a "crime of violence" for purposes of early release if the inmate received a two-level enhancement for possession of a dangerous weapon during commission of the offense, under Sentencing Guidelines §§ 2D1.1, 2D1.11. BOP Program Statement 5162.02, CN-01, § 9, at 7 (July 24, 1995, as amended Apr. 23, 1996).

The courts of appeals reached differing conclusions on the validity of that BOP regulation and program

statement. See *Pelissero* v. *Thompson*, 170 F.3d 442, 445-446 (4th Cir. 1999) (BOP has discretion to define "nonviolent offense" to exclude crimes where relevant conduct included possession of a firearm, even if that definition does not harmonize with the judicial interpretation of "crime of violence" under Section 924(c)(3)); *Venegas* v. *Henman*, 126 F.3d 760, 765 (5th Cir. 1997) (same), cert. denied, 523 U.S. 1108 (1998); contra: *Byrd* v. *Hasty*, 142 F.3d 1395, 1396-1398 (11th Cir. 1998) (BOP's interpretation was inconsistent with the term "nonviolent offense" as used in Section 3621(e)(2)(B) because that term included, by implication, only offenses of conviction that were not "crimes of violence" within the meaning of Section 924(c)(3), and Section 3621(e)(2)(B) "addresses the act of convicting, not sentencing or sentence-enhancement factors"); *Roussos* v. *Menifee*, 122 F.3d 159, 161-164 (3d Cir. 1997) (BOP exceeded its authority); *Bush* v. *Pitzer*, 133 F.3d 455, 456-457 (7th Cir. 1997) (same); *Martin* v. *Gerlinski*, 133 F.3d 1076, 1079-1081 (8th Cir. 1998) (same); *Downey* v. *Crabtree*, 100 F.3d 662, 670 (9th Cir. 1996) (same); *Fristoe* v. *Thompson*, 144 F.3d 627, 631 (10th Cir. 1998) (same).

c. Effective October 9, 1997, BOP revised its regulation governing the Section 3621(e)(2)(B) early release incentive program to clarify its criteria for such release. 62 Fed. Reg. 53,690. The accompanying commentary noted the conflicting judicial holdings on the prior regulation and explained that the new rule "avoids this complication by using the discretion allotted to the Director of [BOP] in granting a sentence reduction to exclude inmates whose current offense is a felony * * * that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives." *Ibid.* As an exercise of the discretion vested in the

Director of BOP, the amended regulation provides that certain categories of inmates "are not eligible for early release," including inmates whose current offense is a felony that involved the carrying, possession, or use of a firearm or dangerous weapon or explosive. 28 C.F.R. 550.58(a)(1)(vi)(B).

BOP Program Statement 5162.04 identifies offenses that, at the discretion of BOP's Director, preclude an inmate from receiving various BOP program benefits, including early release under Section 3621(e). Section 7 of the program statement provides that

> As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.
>
> Inmates whose current offense is a felony that:
>
> * * * * *
>
> involved the carrying, possession, or use of a firearm or other danger weapon or explosives * * *.

BOP Program Statement 5162.04, § 7, at 9 (Oct. 9, 1997). Subsection 7(b) further specifies that controlled substance offenses, in violation of 21 U.S.C. 841(a) and 846, preclude an inmate from being considered for early release if he received a two-level enhancement under Sentencing Guidelines § 2D1.1 for possession of a firearm. BOP Program Statement 5162.04, § 7(b) at 11-12.

2. Respondent Guido was convicted of attempted possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). App., *infra*, 2a. On June 14, 1996, he was sentenced to 60 months' imprisonment. *Id.* at 20a. Respondent Ward was convicted of

possession of heroin with intent to distribute it and distribution of heroin, in violation of 21 U.S.C. 841(a)(1). App., *infra*, 2a. He was sentenced to 90 months' imprisonment. *Id.* at 55a. Respondent Scroger was convicted of possession of methamphetamine with intent to distribute it and attempted manufacture of methamphetamine, in violation of 21 U.S.C. 841(a)(1). App., *infra*, 2a. In 1996, he was sentenced to 63 months' imprisonment. *Id.* at 88a. In each case, the respondent's sentence was based in part on a two-level enhancement of the offense level under Sentencing Guidelines § 2D1.1(b)(1) because the offense involved possession of a dangerous weapon. App., *infra*, 20a, 55a, 88a.

While serving their terms of imprisonment, each respondent entered a BOP residential substance abuse treatment program and successfully completed the residential phase of the program. App., *infra*, 21a, 55a, 88a. Each respondent applied to BOP for a one-year reduction in his sentence under 18 U.S.C. 3621(e)(2)(B). In each case, BOP informed the respondent that he was ineligible for early release under Program Statement 5162.02, 5162.04, or both, because his current offense involved the possession of a dangerous weapon. App., *infra*, 21a, 55a-57a, 88a-89a.

3. Each respondent filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, in the United States District Court for the District of Kansas, challenging BOP's denial of his request for early release.

The district court granted relief in all three cases. In separate opinions based largely on the same reasoning, the district court emphasized that the Tenth Circuit's decision in *Fristoe* v. *Thompson*, *supra*, constituted controlling authority in the district court. The *Fristoe* court had held that BOP, in promulgating its prior

Program Statement 5162.02, exceeded its statutory authority when it "categorically exclude[d] from consideration for early release upon completion of a drug treatment program an inmate convicted of a nonviolent offense whose sentence was enhanced for possession of a weapon." App., *infra*, 33a. The district court also cited the opinions of several other courts of appeals that had dealt with BOP's prior regulation and had "emphasized that the statute speaks only in terms of conviction and effectively construed this as an additional statutory limit on BOP's discretion." *Id.* at 34a-35a. The district court then held that the changes that BOP made to its regulation and program statement did not alter that analysis. It ruled that BOP's regulation and program statement conflict with the plain language of 18 U.S.C. 3621(e)(2)(B) because "allowing exclusion on the basis of sentence enhancements abrogates the word 'convicted' in the statute and exceeds the authority given the BOP." App., *infra*, 45a. Thus, the court concluded that BOP's interpretation is not entitled to deference, despite BOP's broad discretion to grant or deny sentence reductions to eligible inmates. *Id.* at 49a. The court emphasized that discretionary exclusion of inmates who received firearm enhancements was "contrary to the rationale of *Fristoe*," namely, that BOP may not "treat sentence enhancements or factors as if they were 'convictions.'" *Id.* at 46a (internal quotations omitted).[2]

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[2] The district court also held that respondents' claims were not barred for failure to exhaust administrative remedies, App., *infra*, 22a-23a, 58a-59a, and that it had jurisdiction over the cases, *id.* at 23a-24a, 57a-58a, 90a-91a. The court rejected respondents' constitutional claims of an entitlement to early release, *id.* at 42a-43a, 76a-77a, 109a, and their claims of illegal retroactive application of the new program statement, *id.* at 43a-44a, 110a.

The court ordered BOP to reconsider each respondent for a sentence reduction without taking into account the respondent's sentencing enhancement for possession of a firearm. In each case, BOP granted early release. App., *infra*, 2a. We have been informed that respondents have begun their periods of supervised release. See *id.* at 2a n.1.

4. The court of appeals affirmed. App., *infra*, 1a-18a. The court held that BOP's new regulation and program statement 5162.04 are invalid under the reasoning and rationale of its prior decision in *Fristoe*. *Id.* at 9a. It reasoned that the new regulation and program statement, "like the old ones, use sentencing enhancements to effectively override the statute's clear statement that a prisoner is eligible if convicted of a nonviolent offense." *Id.* at 14a. The court concluded that the new regulation and program statement do not merit deference. The court acknowledged BOP's discretion to determine which eligible inmates receive a sentence reduction under section 3621(e)(2)(B), but held that "BOP may not disregard the statutory eligibility requirements by categorically excluding from sentence reduction eligibility prisoners convicted of nonviolent offenses whose sentences were enhanced because of firearms. In doing so, it has exceeded its statutory authority." *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

This case presents the question whether BOP may exercise its discretion under 18 U.S.C. 3621(e)(2)(B) to deny eligibility for early release from custody, based on the successful completion of a substance abuse treatment program, to the category of prisoners whose current offense is a felony that "involved the carrying, possession, or use of a firearm." 28 C.F.R.

550.58(a)(1)(vi)(B). On April 24, 2000, the Court granted the petition for a writ of certiorari in *Lopez* v. *Davis*, No. 99-7504, to review a decision of the Eighth Circuit raising the same issue.

As we explained in our brief in response to the petition in *Lopez*, Section 3621(e)(2)(B) provides BOP with discretion to grant early release to nonviolent offenders who successfully complete a substance abuse treatment program. It states that the term of imprisonment of a prisoner convicted of a nonviolent offense "may be reduced" by BOP upon the prisoner's successful completion of a BOP substance abuse treatment program. 18 U.S.C. 3621(e)(2)(B). "The word 'may,' when used in a statute, usually implies some degree of discretion." *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983). Nothing in the statute contradicts that interpretation. In light of the statute's grant of discretion to BOP in deciding which nonviolent offenders should receive early release, the question is whether BOP's implementation of the statute is a permissible one. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); see also *Reno* v. *Koray*, 515 U.S. 50, 61 (1995). As the Eighth Circuit correctly ruled, BOP relied on a "manifestly permissible construction of the statute" and appropriately exercised its discretion when it identified, as prisoners who would not be granted early release under 18 U.S.C. 3621(e)(2)(B), categories of prisoners convicted of nonviolent offenses within the meaning of the statute, but whose "underlying conduct indicates that they pose a serious risk to public safety." *Bellis* v. *Davis*, 186 F.3d 1092, 1095 (1999), cert. granted *sub nom. Lopez* v. *Davis*, 120 S. Ct. 1717 (2000); accord *Bowen* v. *Hood*, 202 F.3d 1211 (9th Cir. 2000), petitions for cert. pending, Nos. 99-10159, 99-10221.

When the Court reviews that ruling by the Eighth Circuit in *Lopez*, it will consider the validity of BOP's current early release regulation and program statement which were applied in respondents' cases. The Court's resolution of that question will likely determine whether BOP engaged in a lawful exercise of discretion in respondents' cases as well. Accordingly, this petition should be held pending the Court's decision in *Lopez*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Lopez* v. *Davis*, No. 99-7504, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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JULY 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 99-3125, 99-3129 AND 99-3143

JAMES WARD, JIMMY SCROGER,
AND CHRISTOPHER LAMAR GUIDO,
PETITIONERS-APPELLEES

v.

J.W. BOOKER, WARDEN, RESPONDENT-APPELLANT

[Filed: Jan. 19, 2000]

Before: BALDOCK, MCWILLIAMS, and ANDERSON, Circuit Judges.

STEPHEN H. ANDERSON, Circuit Judge.

Petitioners James Ward, Jimmy E. Scroger, and Christopher Lamar Guido, former inmates at the Leavenworth Federal Prison Camp in Leavenworth, Kansas, brought these habeas actions against respondent J.W. Booker, the warden at Leavenworth, challenging a nationwide Bureau of Prisons ("BOP") rule which initially denied them a sentencing reduction available to certain inmates who successfully completed a drug treatment program. The BOP's rule initially denied the sentence reduction to petitioners because their sentences for drug offenses were enhanced under

U.S.S.G. § 2D1.1(b)(1) for possession of a firearm. The district court granted the three habeas petitions and ordered the BOP to reconsider each petitioner's request for a sentence reduction, without regard to the petitioners' receipt of § 2D1.1(b)(1) sentencing enhancements. The BOP did so, determined that there was no other basis for denying the requests, and reduced each petitioner's sentence by one year.[1] It now appeals, arguing the district court erred in invalidating its application of its rule to initially deny petitioners' their sentence reductions. We affirm the district court.

BACKGROUND

I. Petitioners' Convictions and Sentences:

James Ward was convicted of possession with intent to distribute and distribution of heroin, in violation of 21 U.S.C. § 841(a)(1). His sentence was enhanced under U.S.S.G. § 2D1.1(b)(1) because an accessible firearm was found during a search of his residence. Jimmy Scroger was convicted of possession with intent to distribute and with attempted manufacture of methamphetamine, in violation of 21 U.S.C. § 841(a)(1). His sentence was enhanced under § 2D1.1(b)(1) because loaded firearms were found at the residence where he was arrested. Christopher Guido was convicted of attempted possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). His sentence was

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[1] Apparently, all three have been released to halfway houses to finish the custodial portion of their sentences, prior to commencing their terms of supervised release. While there was initially some question whether this appeal is moot, all parties now agree it is not, and we concur in that agreement.

enhanced under § 2D1.1(b)(1) because a loaded handgun was found on his person when he was arrested.

II. Statutory and Regulatory Provisions Relating to Drug Treatment Programs:

In the Violent Crime Control and Law Enforcement Act of 1994, Congress directed the BOP to make available to "eligible prisoners" residential substance abuse treatment programs. *See* 18 U.S.C. § 3621(e)(1). "Eligible prisoners" are defined as those "determined by the Bureau of Prisons to have a substance abuse problem" and who are "willing to participate in a residential substance abuse treatment program." 18 U.S.C. § 3621(e)(5)(B). To provide an incentive for prisoners to participate in the treatment programs, Congress provided that:

> The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621(e)(2)(B). The statute does not define the term "convicted of a nonviolent offense." The statute also does not establish any additional criteria for determining eligibility for sentence reduction. The legislative history indicates Congress intended to give the BOP discretion to develop such additional criteria.[2]

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[2] The House Report states in part:

> In effect, this subparagraph [18 U.S.C. § 3621(e)(2)(B)] authorizes the Bureau of Prisons to shorten by up to one year the prison term of a prisoner who has successfully completed a

See Fristoe v. Thompson, 144 F.3d 627, 631 (10th Cir. 1998) ("It is undisputed that the BOP has been delegated the authority to interpret § 3621(e)(2)(B).").

Accordingly, to establish such criteria, the BOP promulgated a regulation in 1995 which excluded from eligibility inmates whose "current offense" is "a crime of violence" as that term is defined in 18 U.S.C. § 924(c)(3).[3] *See* 28 C.F.R. § 550.58 (1995). The BOP also issued Program Statement No. 5162.02 on July 24, 1995, which further explained its interpretation of the term "crime of violence." As this court noted in a prior decision addressing the validity of that Program Statement:

> Section 9 of the Program Statement provide[d] that convictions . . . obtained under 21 U.S.C. § 841 or § 846, should be considered convictions for a "crime of violence" if the sentencing court increased the base level of the sentence for possession of a dangerous weapon during the commission of the offense. Under the rationale of the Program Statement and the regulation, then, [a conviction under § 841] was

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treatment program, based on criteria to be established and uniformly applied by the Bureau of Prisons.

H.R. Rep. No. 103-320, at 7, 1993 WL 537335 (1993).

[3] 18 U.S.C. § 924(c)(3) defines a crime of violence as follows:

> an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

> not a "nonviolent offense," because of the sentencing enhancement and [the prisoner] was therefore ineligible for the sentence reduction.

Fristoe, 144 F.3d at 629-30. Thus, the initial Program Statement explicitly defined "nonviolent offense" under 18 U.S.C. § 3621(e)(2)(B) to exclude offenses where a sentence was enhanced based upon possession of a firearm.[4]

Inmates around the country began to challenge the Program Statement. Among them was the petitioner in *Fristoe*, who articulated his argument to this court as "whether the BOP has adopted a permissible construction of the statute [18 U.S.C. § 3621(e)(2)(B)]." *Fristoe*, 144 F.3d at 630. We concluded it had not: "[t]he BOP's interpretation violates the plain language of the statute and cannot be upheld." *Id.* at 631. We noted that most

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[4] Program Statement 5162.02 provided the following example:

> *Example*: Section 841 of Title 21 United States Code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11) the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic," e.g., if a dangerous weapon was possessed during commission of the offense, the court would increase the defendant's base offense level by 2 levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a substantial risk that force may be used against persons or property. Accordingly, a defendant who has received a conviction for manufacturing drugs, (21 U.S.C. § 841) and receives a two level enhancement for possession of a firearm has been convicted of a "crime of violence."

Program Statement 5162.02 at ¶ 9, Appellees' Answer Br. Addendum A at 7.

other courts had reached the same conclusion. *See Martin v. Gerlinski*, 133 F.3d 1076, 1079-81 (8th Cir. 1998); *Bush v. Pitzer*, 133 F.3d 455, 456-57 (7th Cir. 1997); *Roussos v. Menifee*, 122 F.3d 159, 161-64 (3d Cir. 1997); *Downey v. Crabtree*, 100 F.3d 662, 666-71 (9th Cir. 1996); *but see Pelissero v. Thompson*, 170 F.3d 442, 445-48 (4th Cir. 1999) (upholding the BOP's Program Statement against a similar challenge); *Venegas v. Henman*, 126 F.3d 760, 761-63 (5th Cir. 1997) (same).

Presumably in response to this judicial development, the BOP issued a new regulation and new Program Statement. These are the provisions applicable to and challenged by petitioners in this case. The current version of 28 C.F.R. § 550.58 provides in part as follows:

> An inmate who was sentenced to a term of imprisonment . . . for a nonviolent offense, and who is determined to have a substance abuse problem, and successfully completes a residential drug abuse treatment program during his or her current commitment may be eligible, in accordance with paragraph (a) of this section, for early release by a period not to exceed 12 months.
>
> (a) Additional early release criteria.
>
> (1) As an exercise of the discretion vested in the Director of the Federal Bureau of Prisons, the following categories of inmates are not eligible for early release:
>
> . . . .
>
> (vi) Inmates whose current offense is a felony:

> (A) That has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
>
> (B) That involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
>
> (C) That by its nature or conduct, presents a serious potential risk of physical force against the person or property of another. . . .

28 C.F.R. § 550.58. Additionally, on October 9, 1997, the BOP issued a new Program Statement, No. 5162.04, which states in pertinent part as follows:

> As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.
>
> Inmates whose current offense is a felony that:
>
> - has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
> - involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
> - by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, ...

Program Statement 5162.04 at ¶ 7, Appellant's Opening Br. Addendum R-2 at 8-9. Like the previous Program Statement, the new Program Statement contains the example of a 21 U.S.C. § 841 offense with a "Specific Offense Characteristic Enhancement" that renders the offender ineligible for sentence reduction. *See supra* n. 4. As it explicitly states, "[a]ccordingly, an inmate who was convicted of manufacturing drugs (21 U.S.C. § 841) and *received a two-level enhancement for possession of a firearm has been convicted of an offense that will preclude him from receiving certain Bureau program benefits.*" *Id.* at ¶ 7(b), Appellant's Opening Br. Addendum R-2 at 12.

In sum, the new regulation and Program Statement lead to the same result as the prior, invalidated Program Statement, in that inmates whose sentences were enhanced because of firearms involvement are ineligible for the sentence reduction of 18 U.S.C. § 3621(e)(2)(B). However, they purport to accomplish that result as an exercise of the BOP's discretion to determine eligibility criteria, not as an interpretation of the term "convicted of a nonviolent offense" under § 3621(e)(2)(B). The crucial question presented by this case is whether that difference in methodology is meaningful and significant, or whether the rationale of *Fristoe* dictates the conclusion that the revised regulation and new Program Statement are also invalid.

DISCUSSION

As both parties agree, this case presents a purely legal question: whether the BOP's new regulation and Program Statement—which deny sentence reductions to prisoners whose sentences for nonviolent drug offenses were enhanced because firearms were

involved—are permissible as an exercise of BOP discretion under § 3621(e)(2)(B) or are invalid under *Fristoe*. The district court held they were invalid, determining that the rationale of our prior decision in *Fristoe* compelled that conclusion. We note that we have recently held that our obligation to follow prior decisions "includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings." *United States v. Meyers*, 200 F.3d 715 (10th Cir. 2000). We review the district court's decision de novo and hold that the new regulation and Program Statement are invalid under the reasoning and rationale of *Fristoe*.

We begin by examining *Fristoe*. The petitioner in *Fristoe* was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841 and 846. At sentencing, he received a two-level enhancement under § 2D1.1(b)(1) for firearms possession. Although *Fristoe* addressed the earlier version of 28 C.F.R. § 550.58 and Program Statement 5106.02, we use the same legal analysis to examine the validity of the current version of the regulation and the current Program Statement (No. 5106.04). Accordingly, we "interpret[ ] the statute [18 U.S.C. § 3621(e)(2)(B)] to determine whether the BOP exceeded its statutory authority." *Fristoe*, 144 F.3d at 630-31.[5] We employ a slightly different analysis, however, depending on the particular means by

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[5] As we noted in *Fristoe*, we may not review the substantive decisions of the BOP under 18 U.S.C. § 3621(e)(2)(B). *See* 18 U.S.C. § 3625; *Fristoe*, 144 F.3d at 630. However, we may review whether the BOP acted in a way which exceeded its statutory authority.

which the BOP presents its interpretation:

> An agency's interpretation of a statute by formal regulation or adjudication is entitled to deference, so long as the agency's interpretation is based upon a permissible construction of the statute. Where the agency's interpretation of the statute is made informally, however, such as by a "program statement," the interpretation is not entitled to *Chevron* deference, but will instead be considered only to the extent that it is well-reasoned and has "power to persuade."

Id. at 631 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984)) (further citation omitted).

In *Fristoe*, we began by noting that "courts typically do not consider the predicate drug offense here, conspiracy to distribute cocaine, a 'crime of violence.'" *Id.* We therefore deduced that the BOP's classification of Mr. Fristoe's nonviolent drug offense as a "crime of violence" under § 3621(e)(2)(B) "must rest entirely upon consideration of sentencing factors which are not implicated categorically by the nature of his underlying offense." *Id.* Such "[r]eliance on sentencing enhancements . . . conflicts with the plain language of the statute . . . [which] refers to prisoners '*convicted* of a nonviolent *offense*.'" *Id.* As we explained in a subsequent opinion discussing *Fristoe*:

> We reasoned that § 3621(e)(2)(B) simply does not authorize BOP to treat sentence enhancements or factors as if they were "convictions." In other words, if the prisoner has not been convicted of a

violent offense, BOP cannot use sentencing factors or enhancements to convert a nonviolent offense into a violent one for purposes of § 3621(e)(2)(B).

Martinez v. Flowers, 164 F.3d 1257, 1260 (10th Cir. 1998) (quoting *Fristoe*, 144 F.3d at 632). Significantly, we provided no caveats to our condemnation of the BOP's use of sentencing enhancements to convert nonviolent offenses into violent ones for eligibility purposes under the statute. Indeed, in *Fristoe*, we described our holding as "*any* resort to sentencing factors in the absence of a conviction of an offense which constitutes a crime of violence is impermissible." *Fristoe*, 144 F.3d at 632 n. 3 (emphasis added).

The BOP argues that, for two reasons, *Fristoe* does not control our disposition in this case. First, it argues that *Fristoe* addressed only the validity of a BOP Program Statement, not a regulation, and program statements are entitled to no deference. The BOP's new rule, by contrast, rests upon both a program statement and a formal regulation, the latter of which is entitled to *Chevron* deference. Second, the BOP argues the prior Program Statement, invalidated in *Fristoe*, overtly attempted to define the statutory term "convicted of a crime of violence" to include convictions of nonviolent offenses with a firearms sentencing enhancement. The current regulation and Program Statement, by contrast, overtly reach the same result, but explicitly as an exercise of the discretion clearly bestowed upon the BOP to determine who may and may not participate in the sentence reduction program. Thus, the BOP argues, it has not engaged in improper statutory interpretation; rather it has simply exercised its discretion to

develop eligibility criteria. We address each argument in turn.

I. Regulation vs. Program Statement:

We held in *Fristoe* that "the rationale of the Program Statement and the regulation" expressed the BOP's view that a drug offense with a sentencing enhancement for firearms possession was not a "nonviolent offense" under § 3621(e)(2)(B). *Fristoe*, 144 F.3d at 630. Despite that reference to the rationale of both the regulation and the Program Statement, the focus of our analysis was on the Program Statement, which, unlike the regulation, *explicitly* held that prisoners with drug convictions with firearms sentencing enhancements were ineligible to participate in the early release program. Indeed, we applied the non-deferential review standard applicable to "informal" agency interpretations like program statements, holding that "[t]he BOP's program statement definition of a 'nonviolent offense' is not well-reasoned, and fails to persuade us it is entitled to deference." *Id.* at 631. We therefore assume, for purposes of this appeal, that *Fristoe* only clearly invalidated a program statement, not a regulation. We likewise assume, for purposes of this appeal, that we review in this case both the regulation and the new Program Statement.[6] Accordingly, we apply the

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[6] Petitioners argue that the new regulation does not actually state that a prisoner convicted of a nonviolent offense who received a sentence enhancement is ineligible for sentence reduction. Rather, they argue, it is only the new Program Statement which clearly mandates that result. Thus, they argue that, in this appeal, as in *Fristoe*, we address only the validity of a program statement. The BOP does not directly refute this argument, stating only "[i]t is perhaps most accurate to say that disqualification of inmates who received sentencing enhancements for gun possession is based

deferential review standard to the regulation and the non-deferential review standard to the Program Statement. *See Fristoe*, 144 F.3d at 631.

II. Validity of New Regulation and Program Statement:

The BOP argues that the new regulation and Program Statement, unlike the prior ones, do not attempt to define any statutory term, but merely express eligibility criteria clearly entrusted to the BOP's discretion. We believe that the BOP relies upon "a distinction without a difference." *Kilpatrick v. Houston*, 36 F. Supp.2d 1328, 1330 (N.D. Fla.), *aff'd*, 197 F.3d 1134 (11th Cir. 1999).

In *Fristoe*, we held that the operative statute, § 3621(e)(2)(B), plainly stated that prisoners *convicted of nonviolent offenses* were eligible for sentence reductions. We emphasized in that opinion and in *Martinez* that the *statute* addresses *convictions*, and that convictions for drug offense are nonviolent. We held that *any* use of sentence enhancements to turn a conviction of a nonviolent offense into a violent offense for purposes of § 3621(e)(2)(B) was impermissible, simply because it ran afoul of the statute's clear language.

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on a combination of the new regulations and the new program statement." Appellant's Reply Br. at 3. While there is some ambiguity as to whether the new regulation clearly addresses prisoners with § 2D1.1(b)(1) sentence enhancements, we will assume for the purposes of this appeal that it does. Thus, we address the validity of both the regulation and the program statement, in context of their use of § 2D1.1(b)(1) sentence enhancements to determine eligibility.

The language of the statute remains unchanged and its focus on convictions for nonviolent offenses still stands. The BOP's new regulation and Program Statement, like the old ones, use sentencing enhancements to effectively override the statute's clear statement that a prisoner is eligible if convicted of a nonviolent offense. Couching it as an exercise of discretion does not make it any less contrary to the statute. As a district court recently observed in an opinion affirmed by the Eleventh Circuit, to hold otherwise would render *Fristoe* "a trivial criticism of the Bureau's drafting technique rather than a substantive ruling on the meaning of the statute and the scope of the Bureau's authority thereunder." *Kilpatrick*, 36 F. Supp.2d at 1330. *See Samples v. Scibana*, 74 F. Supp.2d 702, 707 (E.D. Mich. 1999) ("This Court further agrees with other district courts that the amendments to both 28 C.F.R. § 550.58(a)(1) and Program Statement 5162.04 are an attempt by the BOP to disregard the line of federal circuit court cases that held that the BOP could not use a sentence enhancement to conclude that a prisoner had not been convicted of a nonviolent offense."); *Rodriguez v. Herrera*, 72 F. Supp.2d 1229, 1231 (D. Colo. 1999) ("[T]he revised provision runs afoul of *Fristoe* by declaring a category of statutorily eligible inmates 'ineligible' solely on the basis of sentencing factors implicated neither by the nature of the underlying offense nor by the definition of violent crimes set forth at 18 U.S.C. § 924(c)(3)."); *Todd v. Scibana*, 70 F. Supp.2d 779, 784 (E.D. Mich. 1999) ("The amendments to both 28 C.F.R. § 550.58(a)(1) and P.S. 5162.04 appear to be an attempt by the BOP to circumvent the line of federal circuit court cases which hold that the BOP cannot use a sentence enhancement to conclude that a prisoner has not been convicted of a nonviolent

offense."); *Nelson v. Crabtree*, 59 F. Supp.2d 1081, 1084 (D. Or. 1999) ("[The Ninth Circuit held] that the operative word of § 3621(e)(2)(B) is 'conviction.' A decision not to allow early release may only be based on the nature of the conviction; sentencing enhancements . . . are irrelevant."); *Williams v. Clark*, 52 F. Supp.2d 1145, 1151 (C.D. Cal. 1999) ("The language of Section 3621(e)(2)(B) has not been amended . . . and it remains plain and clear; the BOP may not use a sentence enhancement to conclude that a prisoner has not been convicted of a nonviolent offense."); *Hicks v. Brooks*, 28 F. Supp.2d 1268, 1272-73 (D. Colo. 1998) ("[T]he BOP again has accomplished precisely what *Fristoe* said it may not, i.e., exclude categorically from consideration for early release upon completion of a drug treatment program those inmates convicted of a nonviolent offense whose sentence was enhanced for possession of a weapon and, once again, convert a conviction for a nonviolent offense into a violent one by considering the sentence enhancement."); *Gavis v. Crabtree*, 28 F. Supp.2d 1264, 1266 (D. Or. 1998) ("The inescapable result of this new program statement is that it reverses governing case law by looking to the underlying facts to exclude prisoners [with firearms sentencing enhancements] . . . from early release consideration.").

We recognize that in reaching this conclusion, we part company with the Eighth Circuit, which recently held that the new regulation and Program Statement were valid: "[w]e think that the BOP's decision to exclude these additional categories of inmates from eligibility [i.e. those with sentencing enhancements because of firearms possession] represent [*sic*] a manifestly permissible construction of the statute and an

appropriate exercise of the BOP's discretion." *Bellis v. Davis*, 186 F.3d 1092, 1095 (8th Cir. 1999), *petitions for cert. filed*, —— U.S.L.W. —— (U.S. Dec. 15, 1999) (Nos. 99-7504, 99-7558). The court simply dismissed as "of no relevance" its prior decision in *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998), which invalidated the earlier regulation and Program Statement for the same reasons we did in *Fristoe*. *Id.* Nonetheless, we join the Eleventh Circuit and numerous district courts, whose reasoning we find more persuasive.

Thus, whether we review the current regulation or the current Program Statement, we conclude that they conflict with the clear language of § 3621(e)(2)(B). The regulation is therefore not "based upon a permissible construction of the statute." *Fristoe*, 144 F.3d at 631; *see also Martinez*, 164 F.3d at 1259 (noting that we defer to agency's interpretation of a statute through a formal regulation only "if it is based on a permissible constructions [*sic*] of the statute").[7] The Program

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[7] *Martinez* does not compel us to defer to the new regulation in this case. *Martinez* dealt with a different eligibility criterion in 28 C.F.R. § 550.58. It upheld the validity of the BOP's exclusion from eligibility of prisoners with a "prior conviction for homicide, forcible rape, robbery, or aggravated assault." *Id.*; *see* 28 C.F.R § 550.58(a)(iv). In distinguishing *Fristoe*, we noted that this part of § 550.58 "looks to inmates' actual criminal convictions and does not attempt to convert something else, such as a sentencing enhancement, into a conviction." *Martinez*, 164 F.3d at 1260. We also noted that § 550.58, as a formal regulation, was entitled to "full *Chevron* deference," unlike the Program Statement in *Fristoe*. *Id.* at 1261. Even though we upheld one part of § 550.58 in *Martinez*, that by no means compels us to uphold a different part of it here, when we have concluded that the provision challenged in this case is "manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 104 S. Ct. 2778.

Statement is not "well-reasoned" nor does it have "'power to persuade.'" *Id.*

In reaching this conclusion, we in no way denigrate the BOP's broad discretion to determine who among eligible prisoners may receive a sentence reduction following participation in a substance abuse treatment program. As the Seventh Circuit has observed, "[c]ommission of a 'nonviolent offense' makes a prisoner eligible for consideration but does not require the Bureau to grant the boon he seeks. Eligibility is not entitlement." *Bush*, 133 F.3d at 457; *see also Samples*, 74 F. Supp.2d at 708 ("While early release under § 3621(e)(2)(B) is open to all prisoners who meet the statutory requirements, the statute vests the BOP with broad discretion to grant or deny sentence reductions to eligible prisoners."); *Rodriguez*, 72 F. Supp.2d at 1231-32 (noting that "the fact Petitioners are eligible for consideration for early release under § 3621(e)(2)(B) does not mean they are entitled to early release"); *Todd*, 70 F. Supp.2d at 785 ("While eligibility for early release under section 3621(e)(2)(B) is open to all prisoners who meet the statutory requirements, the statute vests the BOP with broad discretion to grant or deny sentence reductions to eligible prisoners based upon factors other than the categorical restrictions currently imposed."). We simply hold that the BOP may not disregard the statutory eligibility requirements by categorically excluding from sentence reduction eligibility prisoners convicted of nonviolent offenses whose sentences were enhanced because of firearms. In doing so, it has exceeded its statutory authority.

CONCLUSION

For the foregoing reasons, we AFFIRM the decisions of the district court granting petitioners' habeas relief.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

No. 98-3266-RDR

CHRISTOPHER LAMAR GUIDO, PETITIONER

v.

J.W. BOOKER, JR., RESPONDENT

[Filed: Feb. 18, 1999]

MEMORANDUM AND ORDER

ROGERS, Senior District Judge.

This is a petition for writ of habeas corpus, 28 U.S.C. § 2241, filed by an inmate of the Federal Prison Camp, Leavenworth, Kansas. Jurisdiction is also alleged under 28 U.S.C. § 1331. The issue to be resolved is whether a prisoner convicted of a nonviolent drug offense, whose sentence was enhanced for possession of a firearm, was legally deemed by the Director of the Bureau of Prisons to be ineligible to receive the sentence reduction made available under 18 U.S.C. § 3621(e)(2)(B) to prisoners convicted of "nonviolent offenses."

An Order to Show Cause issued. Respondents filed an Answer and Return; and petitioner filed a brief in

response, a motion objecting to exhibits, a Reply, and a motion to supplement record with the sentencing transcript. Having considered all the pleadings and attachments filed together with the relevant authorities, the court makes the following findings and order.

The court finds that petitioner's motion objecting to respondent's evidence (Doc. 5) is without merit and should be denied. The court further finds that petitioner's Motion for Leave to Supplement the Record (Doc. 8) should be granted, and the attached sentencing transcript is accepted as part of the record.

FACTS

The crucial facts are not in dispute. Petitioner was sentenced on June 14, 1996 to a term of sixty months imprisonment for Attempt to Possess With the Intent to Distribute Cocaine in violation of 21 U.S .C. §§ 841(a)(1) and 846. At sentencing, the judge applied a two-level guideline enhancement of his offense level pursuant to U.S .S.G. § 2D1.1(b)(1) for "possession of a dangerous weapon" based upon Guido having a loaded handgun on his person at the time of his arrest[1]. Doc. 8, Attachment at 34.

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[1] There is a factual dispute as to whether or not Guido threatened the arresting DEA agent with his loaded handgun during a scuffle. The agent stated that he identified himself, while petitioner claims he did not know the man struggling with him was a law enforcement officer. This issue need not be resolved because Guido admits he possessed a weapon, and the sentencing judge made it quite clear that the sentencing enhancement was based only upon possession of a weapon and not upon the disputed facts. Doc. 8, Attachment at 32-34.

During his incarceration on October 27, 1997, Guido began participation in a "Comprehensive Drug Abuse Treatment Program" (DATP) and successfully completed the residential phase on July 1, 1998. On October 28, 1997, Guido was "officially notified" that he was not eligible for early release consideration. A form entitled "Notice of Residential Drug Abuse Program Qualification and Provisional 3621(e) Eligibility" was issued to Guido from the Drug Treatment Specialist marked "does not" appear eligible. Doc. 1, Exhibit A; Doc. 4, Exhibit 5. The reasons listed were: "Crime of violence as contained in the Categorization of Offenses Program Statement." *Id.* Guido requested reevaluation from the drug program coordinator on February 23, 1998. This request was denied on February 24, 1998, on the ground that Guido remained "ineligible for the 3621(e) early release" because of his "2 point enhancement for possession of a dangerous weapon." Guido did not file a BP-9, 10 or 11 challenging the denial of eligibility. He filed this action on August 18, 1998. Respondent exhibits and petitioner admits that administrative remedies have not been exhausted. Guido's mandatory release date is March 15, 2000, and he alleges that he would be entitled to immediate release to a half-way house if he were to receive the sentence reduction.

CLAIMS

Petitioner challenges the decision of the Bureau of Prisons as contrary to and in excess of the plain statutory language of 18 U.S.C. § 3621(e)(2)(B); an improper retroactive application to him of amendments of the BOP's rules; and contrary to the recent opinion of the

Tenth Circuit Court of Appeals in *Fristoe v. Thompson*, 144 F.3d 627 (1998).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Respondent shows that petitioner has failed to exhaust his administrative remedies and asserts that this action must be dismissed as a result. Petitioner admits that he did not attempt to resolve this matter by way of the available administrative remedies and asserts it would have been futile and time-consuming. The court finds that Guido has failed to exhaust administrative remedies.

Almost without exception, exhaustion of the BOP's administrative process is required prior to relief being sought in federal court. This court is dissatisfied that Guido failed to pursue the available administrative remedies in the five or more months before he filed this action and in no manner intends to encourage habeas litigants to forego exhaustion upon their own estimation that such remedies would be futile. However, under the particular facts of this case, the court concludes that the exhaustion prerequisite should be waived.

The issues presented by Guido for determination are legal and do not depend on the resolution of factual matters through the development of an administrative record. Moreover, this is a "sufficiently extraordinary case" in which the agency need not be granted an opportunity to correct errors in its proceedings since the BOP, which would conduct any administrative review, promulgated and administers the regulation and program statements at issue and has consistently maintained in litigation across the country that the

policy at issue here is lawful. *See Hernandez v. U.S. Parole Commission*, 1 F. Supp.2d 1262, 1264 (D. Kan. 1998) *citing Fultz v. Stratman*, 963 F. Supp. 926, 929 (S.D. Cal. 1997). Thus, respondent's arguments that the agency should be allowed to make a factual record, to exercise its expertise, and to correct its own mistakes as well as that the administrative process should not be prematurely interrupted are unpersuasive in this instance. In addition, petitioner is claiming that he is entitled to immediate release and has requested expedited review. The dismissal of this action to require petitioner to exhaust administrative remedies could result in his claim for release becoming moot. More importantly, it is clear from other cases, for example, *Scroger v. Booker*, 39 F. Supp.2d 1296 (D. Kan. 1999), that the BOP has routinely denied the claims raised by petitioner when presented by other inmates on administrative appeal. The court concludes that exhaustion would be futile and is waived in this case.

JUDICIAL REVIEW

A threshold consideration is whether or not this court has jurisdiction. The Administrative Procedure Act's provisions for judicial review of agency action are expressly made inapplicable by 18 U.S.C. § 3625 to the BOP's decisions regarding sentence reduction under § 3621(e). *See e.g., LaSorsa v. Spears*, 2 F. Supp.2d 550, 558 (S.D.N.Y. 1998); *Martin v. Gerlinski*, 133 F.3d 1076, 1079 (8th Cir. 1998); *Davis v. Beeler*, 966 F. Supp. 483, 489 (E.D. Ky. 1997). However, the Tenth Circuit has stated that while § 3625 may preclude the courts from reviewing the BOP's substantive decisions in these cases, it does not prevent the court from interpreting the statute to determine whether the BOP exceeded its

statutory authority or violated the Constitution. *See Fristoe*, 144 F.3d at 630-31; *Crawford v. Booker*, 156 F.3d 1243, 1998 WL 567963, **1, FN3 (10th Cir. 1998) (unpublished); *see also Martin*, 133 F.3d at 1076. Moreover, through habeas corpus this court may inquire into the legality under federal law of a prisoner's detention. *See e.g., Downey v. Crabtree*, 100 F.3d 662, 664 (9th Cir. 1996); *Roussos v. Menifee*, 122 F.3d 159, 161, FN3 (3d Cir. 1997) (district court jurisdiction under § 2241 and 28 U.S.C. § 1331); *see also, Fuller v. Moore*, 133 F.3d 914, 1997 WL 791681 (4th Cir. 1997, unpublished, per curiam, Table); *Venegas v. Henman*, 126 F.3d 760, 761 (5th Cir. 1997), *cert. denied*, —— U.S. ——, 118 S. Ct. 1679, 140 L.Ed.2d 817 (1998); *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998); *Pearson v. Helman*, 103 F.3d 133 (7th Cir. 1996, unpublished); *Sesler v. Pitzer*, 110 F.3d 569 (8th Cir.) *cert. denied*, —— U.S. ——, 118 S. Ct. 197, 139 L.Ed.2d 135 (1997); *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *LaSorsa*, 2 F. Supp.2d at 559. In each of the cited cases the BOP's interpretation of eligibility for sentence reduction under § 3621 was reviewed in a habeas corpus context.

The issues presented are purely legal. Consequently, an evidentiary hearing is not necessary.

ENABLING STATUTE—VCCLEA

The court begins by considering the statute which petitioner claims entitles him to early release, 18 U.S.C § 3621(e)(2). As part of the Crime Control Act of 1990, Congress required the BOP to "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." 18 U.S.C. § 3621(b). A few years later, to provide a new incentive to federal pri-

soners to enroll in and complete the BOP's drug treatment programs, Congress authorized the Bureau under § 3621(e)(2)(B) of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), to reduce the sentences of eligible prisoners who completed a drug treatment program. The VCCLEA, promulgated in November, 1994, provides in pertinent part:

> (2) Incentive for prisoners' successful completion of treatment program.—
>
> (A) Generally.—Any prisoner who, in the judgment of the Director of the [BOP], has successfully completed a program of residential substance abuse treatment . . ., shall remain in the custody of the [BOP] under such conditions as the [BOP] deems appropriate. . . .
>
> (B) Period of custody.—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the [BOP], but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621(e)(2). On its face, the statute unambiguously precludes the early release of prisoners convicted of violent offenses and limits reduction to one year or less for other prisoners having completed a drug abuse treatment program. *See LaSorsa*, 2 F. Supp.2d at 554.

BOP REGULATIONS AND PROGRAM STATEMENTS

Congress defined several terms in § 3621(e), but did not define "nonviolent offense." Nor does the statute

specify criteria for awarding a reduction. *Byrd*, 142 F.3d at 1396; *see also Fristoe*, 144 F.3d at 631; *Martin*, 133 F.3d at 1078. Respondent explains in its Answer and Return (Doc. 4 at 9-10) that because of these gaps in the statute, and because the legislative history[2] of the statute left to the Bureau of Prisons the discretion to implement the program, the BOP developed criteria to determine which inmates would be eligible for early release.

28 C.F.R. § 550.58 (1996)

First, respondent states, the BOP "published an interim rule on May 25, 1995," [*citing* 60 Fed. Reg. 53,690 (1995)], "codified at 28 C.F.R. § 550.58," which defined "nonviolent offense" as the converse of "a crime of violence." Under this rule, the qualification of "convicted of a nonviolent offense" was implemented by excluding from eligibility, among others, those persons whose current offense is determined to be a crime of violence as defined in 18 U.S.C. § 924(c)(3)[3]. In other words, the

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[2] Congress left to the discretion of the BOP the determination of how to implement the specifics of the program:

> In effect, this subparagraph [(e)(2)(B)] authorizes the BOP to shorten by up to one year the prison term of a prisoner who has successfully completed a treatment program, based on the criteria to be established and uniformly applied by the BOP.

H.R. 3350, 103d Cong. § 1 (passed by House Nov. 3, 1993) H.R. Rep. 103-320 (1993).

[3] Section 924(c)(3) defines a crime of violence as:

> an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

regulation did two things: (1) as a matter of statutory interpretation, it defined "prisoner convicted of a non-violent offense" in § 3621(e)(2)—the type of prisoner the BOP is not forbidden to release early—to mean a prisoner whose "current offense" does not meet the definition of "crime of violence" in 18 U.S.C. § 924(c)(3). *LaSorsa*, 2 F. Supp.2d at 557. Second, it laid out certain criteria under which the BOP would categorically refuse to exercise its discretion to grant early release. *Id.*

PROGRAM STATEMENT 5330.10

At about the same time, the BOP published Program Statement 5330.10, *Drug Abuse Programs Manual, Inmate*, in the Federal Register setting forth guidelines for drug abuse treatment services (effective June 26, 1995). This Program Statement contains provisions on eligibility for early release in Chapter 6 (amended May 17, 1996 and October 9, 1997) which merely reiterate (and have changed with) the contents of the regulation.

PROGRAM STATEMENT 5162.02

On July 24, 1995, an additional Program Statement was adopted, P.S. 5162.02[4], *Definition of Term, "Crimes of Violence"*, to further interpret the language of the

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(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

[4] P.S. 5162.02 does not apply to petitioner. P.S. 5330.10 states that as of October 9, 1997 the new rule and P.S. 5162.04 supersede the old policy, namely P.S. 5162.02, "with respect to inmates who had not yet begun participation in the residential phase of RDAP." Guido began program participation on October 27, 1997.

interim rule regarding the definition of the term "crime of violence" from Section 924(c)(3). Doc. 4 at 9. Section 5 of this program statement presented the "statutory definition" of "crime of violence" citing § 924(c)(3).

Section 9 of Program Statement 5162.02 enumerated various offenses in the United States Code, including 21 U.S.C. § 841, which "may be crimes of violence depending on the specific offense characteristic assigned." Section 9 provided:

> At the time of sentencing, the court makes a finding if the offense involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," under the subsection entitled "Specific Offense Characteristics."

An example is then given:

> Section 841 of Title 21, [U.S.C.] makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11) the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic," e.g., if a dangerous weapon was possessed during the commission of the offense, the court would increase the defendant's base offense by 2 levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a substantial risk that force may be used against persons or property. Accordingly, a defendant who has received a conviction for manufacturing drugs . . . and receives a

two-level enhancement for possession of a firearm has been convicted of a "crime of violence."

Respondent notes that "inmates nationwide" then "began challenging the regulations and program statements implementing the early release provisions of the drug treatment program," and that "several appellate courts invalidated select provisions" of Program Statement 5162.02. Doc. 4 at 10-11.

REVISED REGULATION 28 C.F.R. § 550.58 (1998)

Respondent further instructs that the BOP responded to the controversy surrounding its first rule by adopting a revised regulation, 28 C.F.R. § 550.58 (1998), on October 9, 1997, which underwent notice and comment, *citing* 62 Fed.Reg. 53,690. Respondent asserts that a "significant change" in the new regulation is that it no longer cites 18 U.S.C. § 924(c)(3) for its definition[5] of the term "crime of violence."

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[5] One court described the definition in the amended 550.58 and identified its source as:

> an amalgam of different United States Code sections, rather than merely drawing from § 924(c)(3). This now includes the § 924(c)(3) language virtually verbatim, but additionally provides, in relevant part, that "[i]nmates whose current offense is a felony . . . [t]hat involved the carrying, possession or use of a firearm or other dangerous weapon or explosives" are ineligible for early release. 28 C.F.R. § 550.58. The former 42 U.S.C. § 3796ii-2 contained remarkably similar language, defining a "violent offender" as one who "is charged with or convicted of an offense, during the course of which offense or conduct . . . [the accused] carried, possessed, or used a firearm or dangerous weapon. . . ." (repealed 1996). The BOP has at least implicitly acknowledged in other litigation that its new definition of crime of violence derives from the repealed stat-

The amended version of § 550.58 identifies three statutory prerequisites for eligibility: sentenced for a nonviolent offense, determined to have a substance abuse problem, and successful completion of the drug abuse treatment program. In the new regulation, the Director of the BOP no longer defines or even mentions the term "crime of violence." Instead, she precludes categories of inmates from early release as an exercise of her discretion. Those excluded, among others, are inmates whose current offense is a felony:

> (A) that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
>
> (B) that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
>
> (C) that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or
>
> (D) that by its nature or conduct involves sexual abuse offenses committed upon children.

28 C.F.R. 550.58(a)(1)(vi) (1998). Paragraphs (A) and (C) are the same as § 924(c)(3).

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ute. *Sesler v. Pitzer*, 110 F.3d 569, 571-72 (8th Cir.), *cert. denied*, —— U.S. ——, 118 S. Ct. 197, 139 L.Ed.2d 135 (1997); *Davis v. Crabtree*, 109 F.3d 566, 569-70 (9th Cir. 1997).

Orr v. Hawk, 156 F.3d at 651, 653.

NEW PROGRAM STATEMENT 5162.04

The BOP further clarified its interpretation of the enabling statute and its revised regulation through issuance of its Program Statement 5162.04 entitled "Categorization of Offenses" (effective October 9, 1997). Section 7 of P.S. 5162.04 appears to be the one applicable to petitioner[6] even though it is not specified in the administrative record. Section 7 begins:

> As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.

Thereafter it also essentially recites the language, but not the section number, of 924(c)(3).

Subsection (b) of P.S. 5162.04 provides in relevant part:

> *Criminal Offenses with a Specific Offense Characteristic Enhancement.*
>
> * * * * * *
>
> At the time of sentencing, the court makes a finding of whether the offense involved the use or threatened use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Specific Offense Characteristics." This subsection references a particular U.S. Sentencing Guideline that provides for an increase

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[6] Section 6(a) lists numerous offenses categorized as "crimes of violence in all cases." Petitioner's offense is not on this list.

in the Total Offense Level if the criminal violation was committed with force.

The following example, very similar to the one in section 9 of P.S. 5162.02, is set forth in the revised regulation:

> Section 841 of Title 21, United States Code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11), the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic" (for example, if a dangerous weapon was possessed during commission of the offense), the court would increase the defendant's base offense level by two levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a serious potential risk that force may be used against persons or property. Specifically, as noted in the U.S. Sentencing Guidelines § 2D1.1., application note 3, the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21 U.S.C. § 841) and received a two-level enhancement for possession of a firearm, has been convicted of an offense that will preclude the inmate from receiving certain Bureau program benefits.

Next in subsection (b) is a list of "offenses for which there could be a Specific Offense Characteristic enhancement for the use of force." Paragraph (3) of subsection (b) includes "Title 21 U.S.C. 841 (NOT (e)), controlled substance violation."

Thus, the current program statement no longer classifies a drug offense with enhancements for firearms possession as a "crime of violence" under § 924(c)(3), but categorizes it as an offense committed with such risk of force that the Director in her discretion shall deny eligibility. The revised P.S. 5162.04 instructs BOP officials that:

> if an inmate is convicted of an offense listed in Section 7 [corresponding to previous section 9 of 5162.02], the inmate should be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

P.S. 5162.04, ¶ 5. Under Section 7(b)(3) of the Program Statement and under the revised regulation, then, petitioner's crime was not nonviolent, due to behavior underlying the sentencing enhancement which "increased the danger of violence." Guido was therefore denied eligibility for the sentence reduction.

FRISTOE

In April, 1998, the United States Court of Appeals for the Tenth Circuit held under similar facts that the BOP may not categorically exclude from consideration for early release upon completion of a drug treatment program an inmate convicted of a nonviolent offense whose sentence was enhanced for possession of a weapon. *See Fristoe*, 144 F.3d at 631. *Fristoe* is controlling authority in this court. The rationale of the *Fristoe* court was that:

> Reliance on sentencing enhancements . . . conflicts with the plain language of the statute. Section

> 3621(e)(2)(B) refers to prisoners "convicted of a nonviolent offense." The statute does not permit resort to sentencing factors or sentencing enhancements attached to the nonviolent offense.
>
> * * * * * *
>
> . . . The eligibility criteria in 18 U.S.C. § 3621(e)(2)(B) refer directly to the offense for which the prisoner was convicted.

Fristoe, 144 F.3d at 631.

Respondent correctly points out that *Fristoe* was decided on the petition of an inmate whose early release had been denied under the old regulation and P.S. 5162.02. Respondent asserts that *Fristoe* is irrelevant to the instant action which it advises is governed by the amended regulation and P.S. 5162.04. Doc. 4, at 21. This court of necessity has reviewed the prior regulation and program statements and the case law considering those provisions to determine the differences and whether or not the amended provisions applicable to this case are free of the statutory misinterpretation found in *Fristoe*.

OTHER CASE LAW

As respondent noted, there has been a spate of recent cases brought by inmates challenging the BOP's denial of their requests for the early release benefit of 3621(e)(2)(B). Almost all dealt with the old regulation and P.S. 5162.02, and held like *Fristoe* that the BOP misinterpreted 18 U.S.C. § 3621(e)(2)(B). Several courts emphasized that the statute speaks only in terms

of conviction and effectively construed this as an additional statutory limit on the BOP's discretion.

The Third Circuit, for example, found that the first regulation promulgated by the BOP and P.S. 5162.02 were contrary to § 3621(e)(2)(B). In its view:

> The statute speaks clearly and unambiguously. The operative word of § 3621(e)(2)(B) is "convicted." . . . . (Petitioner) was convicted of a drug-trafficking offense, which is not a crime of violence. Section 3621(e)(2)(B) addresses the act of convicting, not sentencing or sentence-enhancement factors. The Bureau erred by conflating the guilt-determination (conviction) and sentencing processes.

Roussos, 122 F.3d at 162. The *Roussos* court observed that under the statute, petitioner "is eligible in the absence of his conviction for a nonviolent offense or a crime of violence, neither of which occurred." *Id.*

The Eighth Circuit reached a similar result by reasoning that:

> The operative word in § 3621(e)(2)(B) is "convicted," thus requiring the BOP to look to the offense of conviction itself to determine whether it meets the definition of a "nonviolent offense"; § 3621 does not address sentencing or sentencing-enhancement factors. Here, appellants' convictions were for drug trafficking offenses, which are not crimes of violence.

Martin, 133 F.3d at 1079. The court determined that "the inclusion of sentencing enhancement factors in the

determination of what is a 'nonviolent offense' is not a permissible interpretation of the statute." *Id.*

The Eleventh Circuit reasoned that convictions of violations of 21 U.S.C. §§ 846 and 841(a)(1) are not crimes of violence, and that "although (petitioner) received a sentencing enhancement under § 2D1.1(b)(1), section 3621(e)(2)(B) addresses the act of convicting, not sentencing or sentence-enhancement factors." *Byrd v. Hasty*, 142 F.3d at 1397. The court concluded that the "BOP's interpretation . . . is simply in conflict with the statute's plain meaning." *Id.*

The Fourth Circuit stated in *Fuller v. Moore*, at * 3, *citing Downey*, 100 F.3d at 668: "The relevant statute speaks clearly and unambiguously. The operative word of § 3621(e)(2)(B) is 'convicted.'" The court in *Fuller* found that the "BOP's interpretation contravenes the language of the statute which refers to a 'convicted' person rather than to the 'commission' of an offense[7]."

The Ninth Circuit in *Downey* found that the BOP "departed from traditional methods of statutory construction" in its interpretation of the phrase "convicted of a nonviolent offense" and instead adopted "a unique statutory interpretation technique" to conclude "that inmates are 'convicted of a nonviolent offense' if they did not commit a crime of violence as determined only after considering various Sentencing Guideline factors that may or may not be directly related to the crime for which the inmate was convicted." *Downey v. Crabtree*,

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[7] The Fourth Circuit case cited by respondent in support of its position, *Pelissero v. Thompson*, 155 F.3d 470 (4th Cir. 1998) was contrary to *Fuller*, but was withdrawn by that court on rehearing at 1998 WL 971397 (November 27, 1998).

100 F.3d at 666. The *Downey* court held that possession of a controlled substance with intent to sell, 21 U.S.C. § 841(a)(1), is a nonviolent offense. *Id.* at 668.

The *Downey* court reasoned that the BOP's interpretation of § 3621(e)(2)(B) runs counter to the teachings of *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990) as follows:

> There the Court "require[d] the trial court to look only to the fact of conviction and the statutory definition of the prior offense" in determining whether petitioner's prior burglary offense constituted a previous "conviction of a violent felony" for purposes of a sentencing enhancement statute. *Id.* at 602, 110 S. Ct. at 2160. The Bureau in this case relied on sentence-enhancement devices and related staff considerations, factors external to the constituent elements of the crime of conviction, to define "a nonviolent offense" for the purposes of 18 U.S.C. § 3621(e)(2)(B). Reliance on such external factors flies in the face of the *Taylor* analysis.

Downey, 100 F.3d at 669.

In an opinion cited by the Tenth Circuit in *Fristoe*, the United States District Court for the District of Colorado held that:

> [S]ection 3621 plainly allows eligibility for persons "convicted of a nonviolent offense." Section 9 of the Program Statement (5162.02) purports to look past the conviction, however, and determine whether a weapon was involved, regardless of the conviction. Admirably, BOP's Program Statement attempts to take a more comprehensive view of

> whether a prisoner constitutes a risk of violence, which arguably furthers the important policy of weighing early release against concerns for public safety. Nevertheless, BOP may not rewrite the statute. Congress is presumed to mean what it says, and BOP's interpretation of § 3621 abrogates the word "convicted."

Sisneros v. Booker, 981 F. Supp. 1374, 1376 (D. Colo. 1997).

Of utmost importance to this court is the *Fristoe* decision by the Tenth Circuit. The petitioner in *Fristoe* was convicted of violating the same statute and received the same sentencing enhancement as Guido. The *Fristoe* court noted that "courts typically do not consider" conspiracy to distribute cocaine, a "crime of violence." *Fristoe*, 144 F.3d at 631. The court held that "the statute does not permit resort to sentencing factors or sentencing enhancements attached to the nonviolent offense." *Id.*

The Tenth Circuit disagreed with the position taken by the Fifth Circuit in *Venegas*, 126 F.3d 760, that

> the use of the phrase "a nonviolent offense" merely excludes all inherently violent offenses from eligibility for consideration, while leaving to the Bureau's discretion the determination of which other offenses will or will not be eligible for consideration.

Fristoe, 144 F.3d at 632. The Tenth Circuit stated that the Fifth Circuit's position "would permit the BOP to treat nonviolent offenders as though they were convicted of a violent offense, undermining the express

language of the statute." *Id.* The *Fristoe* court summarized its own holding as: "any resort to sentencing factors in the absence of conviction of an offense which constitutes a crime of violence is impermissible. . . ." *Id.* at FN3.

Respondent would apparently have us disregard all the aforementioned reasoning and case law on the basis that the BOP has promulgated and amended regulations and program statements containing newly worded interpretations of the early release statute. Respondent suggests that its revised regulation and program statements relegate these cases to a "mostly of historic interest" status. Doc. 4 at 12. To the contrary, this court finds that the statutory language interpreted in *Fristoe* has not changed at all, so that these cases remain quite relevant.

There are other cases besides *Venegas* which have upheld decisions of the BOP to deny early release despite challenges to the former regulation and P.S. 5162.02. However, this court finds that the circumstance of actually having a conviction for possession of a firearm such as in *Bush v. Pitzer*, 133 F.3d 455 (7th Cir. 1997) and *Love v. Tippy*, 133 F.3d 1066 (8th Cir.) *cert.denied*, —— U.S. ——, 118 S. Ct. 2376, 141 L.Ed.2d 743 (1998); or of a prior violent offense such as in *Martinez v. Flowers*, 164 F.3d 1257 (10th Cir. 1998), *Stiver v. Meko* 130 F.3d 574 (3d Cir. 1997) and *Jacks v. Crabtree*, 114 F.3d 983 (9th Cir. 1997), *cert. denied*, —— U.S. ——, 118 S. Ct. 1196, 140 L.Ed.2d 325 (1998), clearly distinguishes those cases from the instant action.

There are also cases which, even with a distinguishing circumstance, have held that the BOP has misinter-

preted the statute. *See e.g., Royce v. Hahn*, 151 F.3d 116 (3d Cir. 1998) (convictions for firearm possession); *Davis v. Crabtree*, 109 F.3d 566 (9th Cir. 1997) (same); *McPeek v. Henry*, 17 F. Supp.2d 443 (D. Md. 1998) (same). These courts rely heavily on "well-established" case law in their respective circuits holding that mere possession of a firearm by a felon is not a "crime of violence" under 18 U.S.C. § 924(c)(3).

In *Fristoe*, no such precedent was relied upon since the Tenth Circuit had not decided the firearms issue. The rationale that mere possession is nonviolent was mentioned only in a footnote. In *Fristoe*, the primary ground for decision was that the BOP exceeded its statutory authority.

LEGAL STANDARDS

At the outset, the court notes that petitioner's entitlement to relief depends on his showing that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Guido contends that the regulation and program statement applied to deny his application for early release are contrary to federal law, namely 18 U.S.C. § 3621(e)(2)(B).

Respondent contends that its interpretation of section 3621(e)(2)(B) in its revised regulation is entitled to "full deference." The Tenth Circuit has instructed that the BOP's formal regulation interpreting this statute is entitled to "full Chevron deference," unlike its previous informal program statement. *See Martinez* at 1259, *citing Fristoe*, 144 F.3d at 631. Properly promulgated regulations have the force of law and may

themselves limit the BOP's own discretion further than the statute. *LaSorsa*, 2 F. Supp.2d at 556.

In reviewing an agency's interpretation of a statute through a formal regulation, the court defers to the agency's interpretation if it is based on a permissible construction of the statute. *Martinez* at 1258, *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Regulations such as § 550.58 are normally reviewed under the two-step standard set out by the Supreme Court in *Chevron*; *Wottlin v. Fleming*, 136 F.3d 1032, 1035 (5th Cir. 1998). First, the court looks to the intent of Congress and, if it is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781-82. If, however, the language of the statute is ambiguous or silent on a particular issue, then the court turns to the second step of the analysis and "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2781. If the agency's regulatory interpretation is reasonable, it will receive controlling weight unless "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S. Ct. at 2782; *Martinez* at 1259.

If 18 U.S.C. § 3621(e)(2)(B) is viewed as silent regarding the BOP's authority to deny early release to inmates who have received sentencing enhancements for firearm possession, the court must proceed to decide whether 28 C.F.R. § 550.58 (1998) represents a "permissible construction of the statute." *See Martinez* at 1259. On the other hand, if the intent of Congress is clear in

§ 3621(e)(2)(B), then the court must decide whether the BOP is giving it effect. Thus, either step of the standard leads the court in this case to determine whether the BOP's interpretation of the statute is a reasonable, permissible construction.

The Program Statement, as an internal agency guideline, is entitled to "some deference" if it is a permissible construction of the statute. *Reno v. Koray*, 515 U.S. 50, 61, 115 S. Ct. 2021, 132 L.Ed.2d 46 (1995). Administrative program statements are afforded less deference than regulations because they are "merely internal guidelines [that] may be altered by the Bureau at will." *Koray v. Sizer*, 21 F.3d 558, 562 (3d Cir. 1994), *rev'd on other grounds sub nom., Reno v. Koray, supra*; *see also Martinez* at 1259. However, the court reiterates that on a question of statutory interpretation, no deference is due where the agency's "interpretation is . . . in conflict with the plain language of the statute." *Sisneros v. Booker*, 981 F. Supp. at 1376, *citing National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417, 112 S. Ct. 1394, 1401, 118 L.Ed.2d 52 (1992).

DISCUSSION

ENTITLEMENT TO EARLY RELEASE

Petitioner at least implies in his pro se petition that he has an entitlement to or liberty interest in early release under § 3621, which has been improperly infringed. It has been clearly held by the United States Supreme Court that a convicted person has no constitutional or inherent right to be conditionally released before the expiration of a valid sentence. *See Greenholtz v. Inmates of Nebraska Penal & Correctional*

Complex, 442 U.S. 1, 7, 99 S. Ct. 2100, 2103-04, 60 L.Ed.2d 668 (1979). Nor does § 3621(e)(2)(B) create a liberty interest. *Fristoe*, 144 F.3d at 630. The language of the statute is not mandatory. It provides that the inmate's sentence "*may* be reduced by the Bureau of Prisons." (emphasis added). A statute which allows a decisionmaker to deny the requested relief within its unfettered discretion does not create a constitutionally-recognized liberty interest. *See Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S. Ct. 1741, 1747-48, 75 L.Ed.2d 813 (1983). The court concludes that petitioner's claim of an entitlement to early release under § 3621(e) has no legal merit.

ILLEGAL RETROACTIVE APPLICATION

Guido's assertion that certain BOP rules may not be retroactively applied to him is also without merit. Guido argues that since he committed his offense and was sentenced before the BOP adopted P.S. 5162.04 and Operations Memorandum 052-98 (5162), these provisions cannot now be applied to him.

The OM 052-98 (5162) referred to by petitioner was promulgated on July 1, 1998 in response to *Fristoe*. This memorandum by its own terms does not apply to Guido because he was not participating in a DATP on or before October 9, 1997. As for P.S. 5162.04, it was promulgated on October 9, 1997, before petitioner entered the drug treatment program. *See Martinez* at 1259, FN3.

In any event, there is no ex post facto violation here, because the challenged provisions did not affect the legal consequences of Guido's crime or increase his punishment. *See Fristoe*, 144 F.3d at 630, *citing Stiver*

v. Meko, 130 F.3d at 578 (rejecting similar argument). Moreover, the reduction of sentence afforded by § 3621(e)(2)(B) has never been held to be an automatic entitlement. Rather, it is authorized for qualifying inmates in the discretion of the Bureau of Prisons. *See Bush*, 133 F.3d at 457. Furthermore, the agency has been consistent in its interpretation of its regulation and enabling statute to include an enhanced drug offense as an excluded offense first as a "crime of violence" and then due to its risk of violence. Thus, the new provisions do not represent a change in position for the BOP, and accordingly might apply retrospectively. *Orr*, 156 F.3d at 654; *see also Bush*, 133 F.3d at 458.

VIOLATION OF FRISTOE

Petitioner's main claim is that the denial of his application for sentence reduction exceeded the discretionary authority granted the Bureau of Prisons under 18 U.S.C. § 3621(e)(2)(B). Applying the revised regulation, 28 C.F.R. § 550.58 (1998), to Guido, it is conceded that he "successfully completed a DATP on or after October 1, 1989." In addition, it is generally accepted that his drug trafficking offense is, without more, considered to be nonviolent. Even though Guido meets these conditions of the 1998 regulation, he apparently does not qualify under the BOP's current interpretation as a prisoner who has been "convicted of a nonviolent offense."

Interpreting the phrase "convicted of a nonviolent offense," the revised regulation disqualifies inmates whose current offense has an element of actual or threatened force, or that by its nature or conduct presents a serious potential risk of physical force. As noted, these exclusions are retained from the

former rules derived from 924(c)(3). 28 C.F.R. § 550.58(a)(1)(vi)(A) & (C) (1998). New language in the regulation disqualifies inmates, in addition, whose current offense "involved" possession of a weapon. 28 C.F.R. § 550.58(a)(1)(vi)(B). A district court very recently opined that:

> In effect, the BOP has . . . incorporated into the revised regulation the language of the sentence enhancement for possession of a firearm, language that previously was in Program Statement 5162 .02.

Hicks v. Brooks, 28 F. Supp.2d 1268, 1998 WL 817828 at *5 (D. Colo. 1998). This court disagrees that the added language incorporates sentence enhancements. Instead, the new regulation simply adds a provision expressly excluding crimes such as felon in possession of a firearm. The Tenth Circuit in *Martinez* suggested as much with its observation that the current "550.58 looks to inmates' actual criminal convictions and does not attempt to convert something else, such as a sentencing enhancement, into a conviction." *Martinez* at 1260.

However, even if this court agreed with *Hicks* that the BOP intends by provision (B) in its regulation to exclude inmates with sentence enhancements for possession and not just weapons convictions, it would have no difficulty holding under the reasoning in *Fristoe* that the regulation so interpreted would conflict with the plain language of 18 U.S.C. § 3621(e)(2)(B). To either promulgate or interpret regulatory language as allowing exclusion on the basis of sentence enhancements abrogates the word "convicted" in the statute and exceeds the authority given the BOP.

In any case, the BOP did not cite provision (B) in the regulation as the basis for its finding that petitioner's offense is a crime that excludes him from early release. The BOP cited Program Statement 5162.04 as authority for finding Guido ineligible based upon his sentencing enhancements. Reliance on sentencing enhancements conflicts with the plain language of the statute whether attempted by regulation or program statement. The court concludes that the portion of Section 7(b), P.S. 5162.04 which provides that an inmate convicted of a violation of 21 U.S.C. § 841 is excluded based upon sentencing enhancements, conflicts with the enabling statute and cannot be applied to deny petitioner the early release benefit of § 3621(e)(2)(B).

This court further finds that Section 7(b) as to sentencing enhancements is contrary to the rationale of *Fristoe*. In its subsequent *Martinez* opinion, the Tenth Circuit described its reasoning in *Fristoe* as that "§ 3621(e)(2)(B) simply does not authorize BOP to treat sentence enhancements or factors as if they were 'convictions.'" *Martinez v. Flowers*, at 1260. The court further commented:

> In other words, if the prisoner has not been convicted of a violent offense, BOP cannot use sentencing factors or enhancements to convert a nonviolent offense into a violent one for purposes of § 3621(e)(2)(B).

Id. at 1260. This court is compelled by the rationale in *Fristoe* to find that the BOP has improperly denied early release to petitioner under P.S. 5162.04 on the sole basis of sentence enhancements.

The changes made by the BOP to its regulation and program statements have not rendered *Fristoe* irrelevant. There are no significant differences in the overall scheme of release determinations applicable to petitioner from that examined in *Fristoe*. Moreover, the specific revisions to section 550.58, such as deleting the statute number 18 U.S.C. 924(c)(3), but adding the text of the statute to the regulation along with provision (B), are not shown to have enlarged the BOP's discretion regarding sentence enhancements as it was interpreted in *Fristoe*.

Likewise, the provisions of the new program statement applied to petitioner are not significantly different from P.S. 5162.02. P.S. 5162.04 contains substantially the same paragraph and example specifying that a two-level sentencing enhancement for possession of a firearm attached to a conviction under 21 U.S.C. § 841 requires a denial of early release. Changing the title of the program statement from "Definition of Term, Crimes of Violence" to "Categorization of Offenses" did not correct the statutory misinterpretation found in *Fristoe*. Nor did excluding drug trafficking offenses with enhancements as "an exercise of the discretion vested in the Director," rather than "crimes of violence."

The limit to the director's discretion by the statutory phrase "convicted of a nonviolent offense" survived these changes. The director still does not have discretion to treat a nonviolent offense as a violent offense based on sentencing enhancements. As was stated in *Hicks* on this precise issue:

> The intent of Congress in enacting 18 U.S.C. § 3621(e)(2)(B) is clear. The statute refers to a non-

> violent offense and does not contemplate the consideration of any sentencing factors. Although the Tenth Circuit decided *Fristoe* based upon the former 28 C.F.R. § 550.58 and Program Statement 5162.02, not the 1997 revised regulation, the logic and rationale of *Fristoe* apply to the revised regulation as well.

Hicks v. Brooks, 28 F. Supp.2d 1268, 1272-73.

The reasoning of *Fristoe* applies to this case and entitles Guido to relief. The narcotics offenses under § 841(a)(2), including Guido's predicate offense—attempt to possess with intent to distribute cocaine—are generally held to constitute nonviolent offenses. The "operative word" of § 3621(e)(2)(B) is "convicted." Thus, Guido was "convicted of a nonviolent offense." Section 3621(e)(2)(B) addresses the act of convicting, not sentencing or sentence enhancement factors. Even though a less deferential standard was applied when P.S. 5162.02 was invalidated in *Fristoe*, and "full Chevron deference" is due the new regulation, this court finds that under the higher standard the decision to deny petitioner early release based solely on sentencing enhancements is still a violation of the plain language of 18 U.S.C. § 3621(e)(2)(B). The BOP continues to err "by conflating the guilt-finding process, which is reflected in the statutory language 'convicted,' with the punishment process, which is reflected in the Bureau's program statements referring to sentencing guidelines." *Downey v. Crabtree*, 100 F.3d at 665.

BOP DISCRETION

From the foregoing, it is clear that *Fristoe* pronounced and enforced a limitation on the BOP's discre-

tion to deny the early release benefit. That limitation derives from the plain language of the statute and requires the BOP to look to convictions rather than sentencing enhancements or factors. The BOP heretofore has recognized only those limits which go to its discretion to grant early release. The limit on its discretion to deny the release benefit has consequently not been adequately implemented in the BOP's regulation or program statement. The BOP's decision to deny early release to Guido on the basis of P.S. 5162.04 is contrary to that limitation.

However, the court emphasizes that the discretion granted to the Bureau of Prisons by the statute's language is otherwise quite broad. *See Martinez* at 1259. Without question, the BOP has broad discretion over the entire drug treatment process within the federal corrections system, beginning with determining which inmates ever enter substance abuse programs. *Crabtree*, 100 F.3d at 666. Like the drug treatment placement decisions, decisions regarding whether to grant or deny eligible inmates a sentence reduction under § 3621(e) remain within the Bureau's discretion. *Crabtree*, at 671. While eligibility for early release under § 3621(e)(2)(B) is open to all prisoners who meet the statutory requirements, the statute vests the BOP with broad discretion to grant or deny sentence reductions to eligible prisoners[8]. *LaSorsa*, 2 F. Supp.2d at 553-55; *Jacks*, 114 F.3d at 984.

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[8] As noted in *Jacks*, 114 F.3d at 984, by providing that a sentence "may be reduced," the statute gives the Bureau broad discretion to grant or deny reduction. This conclusion is reinforced by the preceding section of the enabling statute, which states that any prisoner who completes a drug treatment program "shall remain in

In the recent, well-written opinion of *LaSorsa v. Spears*, the United States District Judge cited portions of the legislative history of the early release program's enactment as part of the VCCLEA, and found that the provisions as introduced in both the House and Senate contained no limitations whatsoever on the BOP. He noted that the Senate amended its version of the bill to change the language in paragraph (B) from "prisoner" to "a prisoner convicted of a nonviolent offense" with no discussion. *See LaSorsa*, 2 F. Supp.2d at 554 *citing*, 139 Cong. Rec. S15030-70 (daily ed. Nov. 11, 1993). The judge further noted that the floor debates in the House of Representatives make it clear that substantial discretion was intended to vest in the BOP.[9]

The judge in *LaSorsa* stated his opinion that the BOP "certainly has, under the statute, the ability to deny early release to prisoners, the attendant circumstances of whose convictions involved weapons possession, . . . even though they were not convicted of a weapons offense." *Id.* at 555. The court reasoned:

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the custody of the Bureau under such conditions as the Bureau deems appropriate." 18 U.S.C. § 3621(e)(2)(A).

[9] Both the chair and the ranking member of the Crime and Criminal Justice Subcommittee of the House Judiciary Committee stressed, in response to concerns over the early release program, that release was not guaranteed but was up to BOP. *See* 139 Cong. Rec. H8728 (daily ed. Nov. 3, 1993) (statement of Rep. Schumer) ("[T]his is not mandatory time off, it is an option, up to the prison authorities."), 139 Cong.Rec. H8724 (daily ed. Nov. 3, 1993) (statement of Rep. Sensenbrenner) ("[T]hat is in the discretion of the Bureau of Prisons on whether or not the prisoner's term ought to be reduce [sic] upon completion of the program."). *See* FN2 and further discussion of legislative history therein. *LaSorsa*, 2 F. Supp.2d at 554.

> It is important to realize, however, that such considerations are proper not as an exercise in statutory interpretation by BOP—i.e., not as a matter of defining the phrase "convicted of a nonviolent offense" under § 924(c)(3)— but rather as an exercise of the discretion granted by the statute to determine who, among those convicted of a nonviolent offense, will be given early release.

LaSorsa, 2 F. Supp.2d at 556. The judge in *LaSorsa* noted that it is this distinction which some of the case law from other circuits fails to clearly articulate. *Id.*

This court disagrees with this dicta in *LaSorsa*. Here, petitioner is eligible under section 3621(e)(2)(B), but ineligible under the BOP's program statement creating an additional eligibility requirement. The BOP certainly has authority to create additional eligibility requirements, even ones not suggested by the statute which is largely silent as to criteria. However, the BOP does not have authority to create an additional eligibility requirement which conflicts with the plain language of the statute. This court's holding is limited to invalidating the improper eligibility requirement.

The BOP's main argument here, as in *LaSorsa*, appears to be that because it has broad discretion under § 3621(e) to determine which prisoners are granted early release, it has the discretion to define the statutory terms however it believes will best serve its objectives. Considering this position, the judge in *LaSorsa* stated:

> This argument misses a crucial distinction. BOP does have broad discretion to determine which, among the class of "prisoners convicted of a nonvio-

> lent offense," will be granted early release and for how long (up to one year). BOP does not, however, have the "discretion" to interpret "prisoners convicted of a nonviolent offense" . . . in whatever way it chooses. These are statutory and regulatory terms whose meaning is quite clear, to the extent BOP has its own definitions of these terms, these interpretations are not permissible exercises of discretion but are instead statutory interpretations by an agency to which this court owes some deference only if not contrary to the statute's clear meaning.

LaSorsa, 2 F. Supp.2d at 560. The BOP's interpretation of § 3621(e)(2)(B) abrogating the statutory term "convicted" was not within its discretion and is entitled to no deference by this court.

RELIEF

The court concludes from the foregoing that Guido was improperly denied eligibility for sentence reduction and is entitled to relief. This court does not have the authority to grant release under 18 U.S.C. § 3621(e)(2)(B). Instead, this matter must be referred to the Bureau of Prisons for reconsideration in accordance with this opinion. The BOP must determine whether there is any other basis for denying Guido early release under § 3621(e)(2)(B) or whether release should be granted within its discretion. *Roussos*, 122 F.3d at 164. The respondent is prohibited from denying sentence reduction to Guido solely on the basis of sentence enhancements. Respondent is granted until March 8, 1999 to reconsider Guido's application for early release, and to file a written report with the court as to the outcome of that reconsideration.

IT IS THEREFORE BY THE COURT ORDERED that petitioner's Motion objecting to evidence (Doc. 5) is denied, and that petitioner's Motion for Leave to Supplement the Record (Doc. 8) is granted.

IT IS FURTHER ORDERED that the BOP reconsider petitioner's request for a sentence reduction without consideration of petitioner's sentencing enhancement, in accordance with this opinion.

IT IS FURTHER ORDERED that this court will retain jurisdiction over this matter to insure that petitioner's sentence reduction is promptly and appropriately reconsidered.

IT IS FURTHER ORDERED that respondent reconsider Guido for sentence reduction under 18 U.S.C. § 3621(e)(2)(B) on or before March 8, 1999 and file a status report no later than March 8, 1999, informing the court what action has been taken to comply with this order.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

No. 98-3274-RDR

JAMES WARD, PETITIONER

v.

J.W. BOOKER, RESPONDENT

[Filed: Feb. 12, 1999]

MEMORANDUM AND ORDER

ROGERS, Senior District Judge.

This is a petition for writ of habeas corpus, 28 U.S.C. § 2241, filed by an inmate of the Federal Prison Camp, Leavenworth, Kansas. The issue to be resolved is whether Ward, who was convicted of a nonviolent drug offense but had his sentence enhanced for possession of a firearm, was legally deemed by the Director of the Bureau of Prisons to be ineligible to receive the sentence reduction made available under 18 U.S.C. § 3621(e)(2)(B) to prisoners convicted of "nonviolent offenses."

An Order to Show Cause issued. Respondents filed a Motion to Dismiss alleging failure to exhaust administrative remedies, and petitioner filed a reply brief.

Having considered all the pleadings and attachments filed, together with the relevant authorities, the court makes the following findings and order.

FACTS

The facts are not in dispute. Petitioner was sentenced to a term of seventy months imprisonment for possession with intent to distribute and distribution of heroin, violations of 21 U.S.C. §§ 841(a)(1) and 846. At sentencing, the district court applied a two-level guideline enhancement of his offense. Ward alleges that the enhancement was based upon "constructive" weapons possession because accessible weapons were found in a safe during a search of his co-defendant's "personal sleeping room."

During his incarceration on April 2, 1998, Ward began participation in a "Comprehensive Drug Abuse Treatment Program" (DATP) and successfully completed the residential phase on December 14, 1998. Petitioner has repeatedly sought a one-year reduction in his sentence from the Bureau of Prisons (BOP). The BOP as early as 1996 found Ward "ineligible" for the reduction[1]. A "Notification of Instant Offense Determination" setting forth whether or not Ward was eligible for early release and the rationale should have been issued in 1996 assuming the BOP complied with its own Program Statement 5330.10, paragraph 6.2.3. It appears from the program statement that completion of this document, [Attachment J to P.S. 5330.10, CN-01 (May 17, 1996) & CN-03 (October 9, 1997)], is required

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[1] Neither party provides documentation of this finding, but it is evident from the administrative relief requests exhibited by petitioner with his petition and reply brief.

as to each inmate applying to participate in a drug rehabilitation program and is not generated only upon a request from the inmate. Paragraph 6.3.1 indicates that inmates on the waiting list to enter the drug program on the effective date of the amended program statements had their instant offense reviewed pursuant to the new "Categorization of Offenses" program statement.

In any case, petitioner's administrative relief requests submitted in 1996 as well as the agency's responses to those requests clearly indicate that Ward was denied the sentence reduction on the basis that his current offense was deemed a "crime of violence" pursuant to Program Statement 5162.02, *Definition of Term, "Crimes of Violence"*. At the informal resolution level, Ward's administrative remedy request was denied by the correctional counselor on the basis that:

> Pursuant to P.S. 5162.02 a person charged with 21-841(a)(1) with a 2 point enhancement for weapons is not eligible for the one year reduction.

His BP-9 was denied by the Warden who found him ineligible because his crime was:

> considered a crime of violence by P.S. 5162.02, CN-01, *Definition of Term, "Crimes of Violence"*. This determination is based on policy language contained in Section 9, pages 6 and 7.
>
> * * * * * *
>
> A review of your PSI reveals you received a two-level enhancement for possession of firearms.

Ward appealed the Warden's decision by way of a BP-10 and BP-11. His administrative appeals were denied for the general reason that under P.S. 5162.02, his offense was deemed to be a "crime of violence" due to the two-level sentencing enhancement for possession of firearms. Ward's mandatory release date is "March, 2000," and he alleges, albeit without stating supporting facts, that he would be entitled to immediate release if he were to receive the sentence reduction.

CLAIMS

Petitioner challenges the decision of the Bureau of Prisons as contrary to and in excess of the plain statutory language of 18 U.S.C. § 3621(e)(2)(B); and invalid under the recent opinion of the Tenth Circuit Court of Appeals in *Fristoe v. Thompson*, 144 F.3d 627 (1998) and other cases.

JUDICIAL REVIEW

A threshold consideration is whether or not this court has jurisdiction. The Administrative Procedure Act's provisions for judicial review of agency action are expressly made inapplicable by 18 U.S.C. § 3625 to the BOP's decisions regarding sentence reduction under § 3621(e). *See e.g., LaSorsa v. Spears*, 2 F.Supp.2d 550, 558 (S.D.N.Y. 1998); *Martin v. Gerlinski*, 133 F.3d 1076, 1079 (8th Cir. 1998); *Davis v. Beeler*, 966 F.Supp. 483, 489 (E.D. Ky. 1997). However, the Tenth Circuit has stated that while § 3625 may preclude the courts from reviewing the BOP's substantive decisions in these cases, it does not prevent the court from interpreting the statute to determine whether the BOP exceeded its statutory authority or violated the Constitution. *See Fristoe*, 144 F.3d at 630-31; *Crawford v. Booker*, 156

F.3d 1243, 1998 WL 567963, **1, FN3 (10th Cir. 1998) (unpublished); *see also Martin*, 133 F.3d at 1076. Moreover, through habeas corpus this court may inquire into the legality under federal law of a prisoner's detention. *See e.g., Downey v. Crabtree*, 100 F.3d 662, 664 (9th Cir. 1996); *Roussos v. Menifee*, 122 F.3d 159, 161, FN3 (3d Cir. 1997) (district court jurisdiction under § 2241 and 28 U.S.C. § 1331); *see also, Fuller v. Moore*, 133 F.3d 914 (4th Cir. 1997, unpublished, *per curiam*, Table); *Venegas v. Henman*, 126 F.3d 760, 761 (5th Cir. 1997), *cert. denied*, —— U.S. ——, 118 S. Ct. 1679, 140 L.Ed.2d 817 (1998); *Orr v. Hawk*, 156 F.3d 651 (6th Cir.1998); *Pearson v. Helman*, 103 F.3d 133 (7th Cir. 1996, unpublished); *Sesler v. Pitzer*, 110 F.3d 569 (8th Cir.) *cert. denied*, —— U.S. ——, 118 S. Ct. 197, 139 L.Ed.2d 135 (1997); *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *LaSorsa*, 2 F. Supp.2d at 559. In each of the cited cases the BOP's interpretation of eligibility for sentence reduction under § 3621 was reviewed in a habeas corpus context.

The issues presented are purely legal. Consequently, an evidentiary hearing is not necessary.

MOTION TO DISMISS—EXHAUSTION

Instead of filing an Answer and Return in response to the Order to Show Cause issued in this case, respondent filed a Motion to Dismiss asserting that this action should be dismissed on account of Ward's alleged failure to exhaust administrative remedies. The court finds that petitioner has fully exhausted administrative remedies by raising his claims of the wrongful denial of eligibility for early release under 18 U.S.C. § 3621(e)(2)(B) based upon sentence enhancements at each and every level of the BOP's administrative

remedy process. The fact that the BOP denied his request citing P.S. 5162.02 and subsequently amended that program statement did not put a burden upon Ward to repeat the administrative process making the same claims but citing the amended program statement. This is so because the BOP did not change its policy as to sentence enhancements in its amended program statement. As will be more fully explained herein, the amended program statement contains the same paragraph and example as P.S. 5162.02 on which Ward's ineligibility was based, and this court has no doubt whatsoever that the BOP would reach the same result under the amended version. To require Ward to repeat the administrative process under such circumstances would be futile.

ENABLING STATUTE—VCCLEA

The court begins by considering the statute which petitioner claims entitles him to early release, 18 U.S.C. § 3621(e)(2). As part of the Crime Control Act of 1990, Congress required the BOP to "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." 18 U.S.C. § 3621(b). A few years later, to provide a new incentive to federal prisoners to enroll in and complete the BOP's drug treatment programs, Congress authorized the Bureau under § 3621(e)(2)(B) of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), to reduce the sentences of eligible prisoners who completed a drug treatment program. The VCCLEA, promulgated in November, 1994, provides in pertinent part:

> (2) Incentive for prisoners' successful completion of treatment program.—

> (A) Generally.—Any prisoner who, in the judgment of the Director of the [BOP], has successfully completed a program of residential substance abuse treatment . . ., shall remain in the custody of the [BOP] under such conditions as the [BOP] deems appropriate. . . .
>
> (B) Period of custody.—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the [BOP], but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621(e)(2). On its face, the statute unambiguously precludes the early release of prisoners convicted of violent offenses and limits reduction to one year or less for other prisoners having completed a drug abuse treatment program. *See LaSorsa*, 2 F. Supp.2d at 554.

BOP REGULATIONS AND PROGRAM STATEMENTS

Congress defined several terms in § 3621(e), but did not define "nonviolent offense." Nor does the statute specify criteria for awarding a reduction. *Byrd*, 142 F.3d at 1396; *see also Fristoe*, 144 F.3d at 631; *Martin*, 133 F.3d at 1078. On account of these gaps in the statute, and because the legislative history[2] of the

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[2] Congress left to the discretion of the BOP the determination of how to implement the specifics of the program:

> In effect, this subparagraph [(e)(2)(B)] authorizes the BOP to shorten by up to one year the prison term of a prisoner who

statute left to the Bureau of Prisons the discretion to implement the program, the BOP developed criteria to determine which inmates would be eligible for early release.

28 C.F.R. § 550.58 (1996).

First, the BOP published an interim rule on May 25, 1995, [60 Fed. Reg. 27695 (1995)], codified at 28 C.F.R. § 550.58, which defined "nonviolent offense" as the converse of "a crime of violence." Under this rule, the qualification of "convicted of a nonviolent offense" was implemented by excluding from eligibility, among others, those persons whose current offense is determined to be a crime of violence as defined in 18 U.S.C. § 924(c)(3)[3]. In other words, the regulation did two things: (1) as a matter of statutory interpretation, it defined "prisoner convicted of a nonviolent offense" in § 3621(e)(2)—the type of prisoner the BOP is not forbidden to release early—to mean a prisoner whose "current offense" does not meet the definition of "crime of violence" in 18 U.S.C. § 924(c)(3). *LaSorsa*, 2

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has successfully completed a treatment program, based on the criteria to be established and uniformly applied by the BOP.

H.R. 3350, 103d Cong. § 1 (passed by House Nov. 3, 1993) H.R. Rep. 103-320 (1993).

[3] Section 924(c)(3) defines a crime of violence as:

an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

F.Supp.2d at 557. Second, it laid out certain criteria under which the BOP would categorically refuse to exercise its discretion to grant early release. *Id.*

PROGRAM STATEMENT 5330.10

At about the same time, the BOP published Program Statement 5330.10, *Drug Abuse Programs Manual, Inmate*, in the Federal Register setting forth guidelines for drug abuse treatment services (effective June 26, 1995). This Program Statement contains provisions on eligibility for early release in Chapter 6 (amended May 17, 1996 and October 9, 1997) which merely reiterate (and have changed with) the contents of the regulation.

PROGRAM STATEMENT 5162.02

On July 24, 1995, an additional Program Statement was adopted, P.S. 5162.02[4], *Definition of Term, "Crimes of Violence"*, to further interpret the language of the interim rule regarding the definition of the term "crime of violence" from Section 924(c)(3). Section 5 of this program statement presented the "statutory definition" of "crime of violence" citing § 924(c)(3).

Section 9 of Program Statement 5162.02 enumerated various offenses in the United States Code, including 21 U.S.C. §§ 841 & 846, which "may be crimes of violence

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[4] P.S. 5162.02 no longer applies to petitioner. P.S. 5330.10 states that as of October 9, 1997 the new rule and P.S. 5162.04 supersede the old policy, namely P.S. 5162.02, "with respect to inmates who had not yet begun participation in the residential phase of RDAP." Ward began program participation on April 2, 1998.

depending on the specific offense characteristic assigned." Section 9 provided:

> At the time of sentencing, the court makes a finding if the offense involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," under the subsection entitled "Specific Offense Characteristics."

An example is then given:

> Section 841 of Title 21, [U.S.C.] makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11) the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic," e.g., if a dangerous weapon was possessed during the commission of the offense, the court would increase the defendant's base offense by 2 levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a substantial risk that force may be used against persons or property. Accordingly, a defendant who has received a conviction for manufacturing drugs . . . and receives a two-level enhancement for possession of a firearm has been convicted of a "crime of violence."

Inmates nationwide then began challenging the regulations and program statements implementing the early release provisions of the drug treatment program, and several appellate courts invalidated select provisions of Program Statement 5162.02.

REVISED REGULATION 28 C.F.R. § 550.58 (1998)

The BOP responded to the controversy surrounding its first rule by adopting a revised regulation, 28 C.F.R. § 550.58 (1998), on October 9, 1997, which underwent notice and comment. 62 Fed. Reg. 53,690. The amended version of § 550.58 identifies three statutory prerequisites for eligibility: sentenced for a nonviolent offense, determined to have a substance abuse problem, and successful completion of the drug abuse treatment program. In the new regulation, the Director of the BOP no longer defines[5] or even mentions the term "crime of violence." Instead, she precludes categories of inmates from early release as an exercise of her

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[5] One court described the definition in the amended 550.58 and identified its source as:

> an amalgam of different United States Code sections, rather than merely drawing from § 924(c)(3). This now includes the § 924(c)(3) language virtually verbatim, but additionally provides, in relevant part, that "[i]nmates whose current offense is a felony . . . [t]hat involved the carrying, possession or use of a firearm or other dangerous weapon or explosives" are ineligible for early release. 28 C.F.R. § 550.58. The former 42 U.S.C. § 3796ii-2 contained remarkably similar language, defining a "violent offender" as one who "is charged with or convicted of an offense, during the course of which offense or conduct . . . [the accused] carried, possessed, or used a firearm or dangerous weapon. . . ." (repealed 1996). The BOP has at least implicitly acknowledged in other litigation that its new definition of crime of violence derives from the repealed statute. *Sesler v. Pitzer*, 110 F.3d 569, 571-72 (8th Cir.), *cert. denied*, —— U.S. ——, 118 S. Ct. 197, 139 L.Ed.2d 135 (1997); *Davis v. Crabtree*, 109 F.3d 566, 569-70 (9th Cir. 1997).

Orr v. Hawk, 156 F.3d at 651, 653.

discretion. Those excluded, among others, are inmates whose current offense is a felony:

> (A) that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or
>
> (B) that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or
>
> (C) that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or
>
> (D) that by its nature or conduct involves sexual abuse offenses committed upon children.

28 C.F.R. § 550.58(a)(1)(vi)(1998). Paragraphs (A) and (C) are the same as § 924(c)(3).

NEW PROGRAM STATEMENT 5162.04

The BOP further clarified its interpretation of the enabling statute and its revised regulation through issuance of its Program Statement 5162.04 entitled "Categorization of Offenses" (effective October 9, 1997). Section 7 of P.S. 5162.04 appears to be the one currently applicable to petitioner[6]. Section 7 begins:

> As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be

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[6] Section 6(a) lists numerous offenses categorized as "crimes of violence in all cases." Petitioner's offenses are not on this list.

precluded from receiving certain Bureau program benefits.

Thereafter it also essentially recites the language, but not the section number, of 924(c)(3).

Subsection (b) of P.S. 5162.04 provides in relevant part:

Criminal Offenses with a Specific Offense Characteristic Enhancement.

* * * * * *

At the time of sentencing, the court makes a finding of whether the offense involved the use or threatened use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Specific Offense Characteristics." This subsection references a particular U.S. Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

The following example, very similar to the one in section 9 of P.S. 5162.02, is set forth in the revised regulation:

Section 841 of Title 21, United States Code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11), the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic" (for example, if a dangerous weapon was possessed during commission of the offense), the court would increase the defendant's base

> offense level by two levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a serious potential risk that force may be used against persons or property. Specifically, as noted in the U.S. Sentencing Guidelines § 2D1.1., application note 3, the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21 U.S.C. § 841) and received a two-level enhancement for possession of a firearm, has been convicted of an offense that will preclude the inmate from receiving certain Bureau program benefits.

Next in subsection (b) is a list of "offenses for which there could be a Specific Offense Characteristic enhancement for the use of force." Paragraph (3) of subsection (b) includes Title 21 U.S.C. §§ 841 (NOT (e)), and 846.

Thus, the current program statement no longer classifies a drug offense with enhancements for firearms possession as a "crime of violence" under § 924(c)(3), but categorizes it as an offense committed with such risk of force that the Director in her discretion shall deny eligibility. The revised P.S. 5162.04 instructs BOP officials that:

> if an inmate is convicted of an offense listed in Section 7 [corresponding to previous section 9 of 5162.02], the inmate should be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

P.S. 5162.04, ¶ 5. Under Section 7(b)(3) of P.S. 5162.04 and under the revised regulation, then, petitioner's crime would not be considered nonviolent, due to behavior underlying the sentencing enhancement which "increased the danger of violence." Thus, Ward would be denied eligibility for the sentence reduction under 5162.04 and presumably has been under both the former and amended versions.

FRISTOE

In April, 1998, the United States Court of Appeals for the Tenth Circuit held under similar facts that the BOP may not categorically exclude from consideration for early release upon completion of a drug treatment program an inmate convicted of a nonviolent offense whose sentence was enhanced for possession of a weapon. *See Fristoe*, 144 F.3d at 631. *Fristoe* is controlling authority in this court. The rationale of the *Fristoe* court was that:

> Reliance on sentencing enhancements . . . conflicts with the plain language of the statute. Section 3621(e)(2)(B) refers to prisoners "convicted of a nonviolent offense." The statute does not permit resort to sentencing factors or sentencing enhancements attached to the nonviolent offense.
>
> * * * * * *
>
> . . . The eligibility criteria in 18 U.S.C. § 3621(e)(2)(B) refer directly to the offense for which the prisoner was convicted.

Fristoe, 144 F.3d at 631. This court has reviewed the prior and current regulations and program statements

together with the relevant case law to determine the differences and whether or not the amended provisions now applicable to Ward are free of the statutory misinterpretation found in *Fristoe*.

OTHER CASE LAW

There has been a spate of recent cases brought by inmates challenging the BOP's denial of their requests for the early release benefit of 3621(e)(2)(B). Almost all dealt with the old regulation and P.S. 5162.02, and held like *Fristoe* that the BOP misinterpreted 18 U.S.C. § 3621(e)(2)(B). Several courts emphasized that the statute speaks only in terms of conviction and effectively construed this as an additional statutory limit on the BOP's discretion.

The Third Circuit, for example, found that the first regulation promulgated by the BOP and P.S. 5162.02 were contrary to § 3621(e)(2)(B). In its view:

> The statute speaks clearly and unambiguously. The operative word of § 3621(e)(2)(B) is "convicted." . . . . (Petitioner) was convicted of a drug-trafficking offense, which is not a crime of violence. Section 3621(e)(2)(B) addresses the act of convicting, not sentencing or sentence-enhancement factors. The Bureau erred by conflating the guilt-determination (conviction) and sentencing processes.

Roussos, 122 F.3d at 162. The *Roussos* court observed that under the statute, petitioner "is eligible in the absence of his conviction for a nonviolent offense or a crime of violence, neither of which occurred." *Id.*

The Eighth Circuit reached a similar result by reasoning that:

> The operative word in § 3621(e)(2)(B) is "convicted," thus requiring the BOP to look to the offense of conviction itself to determine whether it meets the definition of a "nonviolent offense"; § 3621 does not address sentencing or sentencing-enhancement factors. Here, appellants' convictions were for drug trafficking offenses, which are not crimes of violence.

Martin, 133 F.3d at 1079. The court determined that "the inclusion of sentencing enhancement factors in the determination of what is a 'nonviolent offense' is not a permissible interpretation of the statute." *Id.*

The Eleventh Circuit reasoned that convictions of violations of 21 U.S.C. §§ 846 and 841(a)(1) are not crimes of violence, and that "although (petitioner) received a sentencing enhancement under § 2D1.1(b)(1), section 3621(e)(2)(B) addresses the act of convicting, not sentencing or sentence-enhancement factors." *Byrd v. Hasty*, 142 F.3d at 1397. The court concluded that the "BOP's interpretation . . . is simply in conflict with the statute's plain meaning." *Id.*

The Fourth Circuit stated in *Fuller v. Moore*, 133 F.3d 914, citing *Downey*, 100 F.3d at 668: "The relevant statute speaks clearly and unambiguously. The operative word of § 3621(e)(2)(B) is 'convicted.'" The court in *Fuller* found that the "BOP's interpretation contravenes the language of the statute which refers to a 'convicted' person rather than to the 'commission' of an offense."

The Ninth Circuit in *Downey* found that the BOP "departed from traditional methods of statutory construction" in its interpretation of the phrase "convicted of a nonviolent offense" and instead adopted "a unique statutory interpretation technique" to conclude "that inmates are 'convicted of a nonviolent offense' if they did not commit a crime of violence as determined only after considering various Sentencing Guideline factors that may or may not be directly related to the crime for which the inmate was convicted." *Downey v. Crabtree*, 100 F.3d at 666. The *Downey* court held that possession of a controlled substance with intent to sell, 21 U.S.C. § 841(a)(1), a predicate offense here and in *Downey*, is a nonviolent offense. *Id.* at 668.

The *Downey* court reasoned that the BOP's interpretation of § 3621(e)(2)(B) runs counter to the teachings of *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990) as follows:

> There the Court "require[d] the trial court to look only to the fact of conviction and the statutory definition of the prior offense" in determining whether petitioner's prior burglary offense constituted a previous "conviction of a violent felony" for purposes of a sentencing enhancement statute. *Id.*, at 602, 110 S. Ct. at 2160. The Bureau in this case relied on sentence enhancement devices and related staff considerations, factors external to the constituent elements of the crime of conviction, to define "a nonviolent offense" for the purposes of 18 U.S.C. § 3621(e)(2)(B). Reliance on such external factors flies in the face of the *Taylor* analysis.

Downey, 100 F.3d at 669.

In an opinion cited by the Tenth Circuit in *Fristoe*, the United States District Court for the District of Colorado held that:

> [S]ection 3621 plainly allows eligibility for persons "convicted of a nonviolent offense." Section 9 of the Program Statement (5162.02) purports to look past the conviction, however, and determine whether a weapon was involved, regardless of the conviction. Admirably, BOP's Program Statement attempts to take a more comprehensive view of whether a prisoner constitutes a risk of violence, which arguably furthers the important policy of weighing early release against concerns for public safety. Nevertheless, BOP may not rewrite the statute. Congress is presumed to mean what it says, and BOP's interpretation of § 3621 abrogates the word "convicted."

Sisneros v. Booker, 981 F.Supp. 1374, 1376 (D. Colo. 1997).

Of utmost importance to this court is the *Fristoe* decision by the Tenth Circuit. The petitioner in *Fristoe* was convicted of violating the same statute and received the same sentencing enhancement as Ward. The *Fristoe* court noted that "courts typically do not consider" conspiracy to distribute cocaine, a "crime of violence." *Fristoe*, 144 F.3d at 631. The court held that "the statute does not permit resort to sentencing factors or sentencing enhancements attached to the nonviolent offense." *Id.*

The Tenth Circuit disagreed with the position taken by the Fifth Circuit in *Venegas*, 126 F.3d 760, that

> the use of the phrase "a nonviolent offense" merely excludes all inherently violent offenses from eligibility for consideration, while leaving to the Bureau's discretion the determination of which other offenses will or will not be eligible for consideration.

Fristoe, 144 F.3d at 632. The Tenth Circuit stated that the Fifth Circuit's position "would permit the BOP to treat nonviolent offenders as though they were convicted of a violent offense, undermining the express language of the statute." *Id.* The *Fristoe* court summarized its own holding as: "any resort to sentencing factors in the absence of conviction of an offense which constitutes a crime of violence is impermissible. . . ." *Id.* at FN3.

There are other cases besides *Venegas* which have upheld decisions of the BOP to deny early release despite challenges to the former regulation and P.S. 5162.02. However, this court finds that the circumstance of actually having a conviction for possession of a firearm such as in *Bush v. Pitzer*, 133 F.3d 455 (7th Cir. 1997); and *Love v. Tippy*, 133 F.3d 1066 (8th Cir.) *cert. denied*, —— U.S. ——, 118 S. Ct. 2376, 141 L.Ed.2d 743 (1998); or of a prior violent offense such as in *Martinez v. Flowers*, 164 F.3d 1257 (10th Cir. 1998), *Stiver v. Meko*, 130 F.3d 574 (3d Cir. 1997) and *Jacks v. Crabtree*, 114 F.3d 983 (9th Cir. 1997), *cert. denied*, —— U.S. ——, 118 S. Ct. 1196, 140 L.Ed.2d 325 (1998), clearly distinguishes those cases from the instant action.

There are also cases which, even with a distinguishing circumstance, have held that the BOP has misinterpreted the statute. *See e.g., Royce v. Hahn*, 151 F.3d 116 (3d Cir. 1998) (convictions for firearm possession); *Davis v. Crabtree*, 109 F.3d 566 (9th Cir. 1997) (same); *Orr*, 156 F.3d at 651 (same); *McPeek v. Henry*, 17 F. Supp.2d. 443 (D. Md. 1998) (same). These courts rely heavily on "well-established" case law in their respective circuits holding that mere possession of a firearm by a felon is not a "crime of violence" under 18 U.S.C. § 924(c)(3).

In *Fristoe*, no such precedent was relied upon since the Tenth Circuit had not decided the firearms issue. The rationale that mere possession is nonviolent was mentioned only in a footnote. In *Fristoe*, the primary ground for decision was that the BOP exceeded its statutory authority.

LEGAL STANDARDS

At the outset, the court notes that petitioner's entitlement to relief depends on his showing that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Ward contends that the basis for denying his application for early release is contrary to federal law, namely 18 U.S.C. § 3621(e)(2)(B).

The Tenth Circuit has instructed that the BOP's current formal regulation interpreting this statute, P.S. 5162.04, is entitled to "full Chevron deference," unlike its previous informal program statement, P.S. 5162.02. *See Martinez*, 164 F.3d at 1260, *citing Fristoe*, 144 F.3d at 631. Properly promulgated regulations have the force of law and may themselves limit the BOP's own

discretion further than the statute. *LaSorsa*, 2 F. Supp.2d at 556.

In reviewing an agency's interpretation of a statute through a formal regulation, the court defers to the agency's interpretation if it is based on a permissible construction of the statute. *Martinez*, 164 F.3d at 1259, *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Regulations such as § 550.58 are normally reviewed under the two-step standard set out by the Supreme Court in *Chevron*; *Wottlin v. Fleming*, 136 F.3d 1032, 1035 (5th Cir. 1998). First, the court looks to the intent of Congress and, if it is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781-82. If, however, the language of the statute is ambiguous or silent on a particular issue, then the court turns to the second step of the analysis and "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2781. If the agency's regulatory interpretation is reasonable, it will receive controlling weight unless "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S. Ct. at 2782; *Martinez*, 164 F.3d at 1260.

If 18 U.S.C. § 3621(e)(2)(B) is viewed as silent regarding the BOP's authority to deny early release to inmates who have received sentencing enhancements for firearms possession, the court must proceed to decide whether 28 C.F.R. § 550.58 (1998) represents a "permissible construction of the statute." *See Martinez*, 164 F.3d at 1260-61. On the other hand, if the

intent of Congress is clear in § 3621(e)(2)(B), then the court must decide whether the BOP is giving it effect. Thus, either step of the standard leads the court in this case to determine whether the BOP's interpretation of the statute is a reasonable, permissible construction.

The Program Statement, as an internal agency guideline, is entitled to "some deference" if it is a permissible construction of the statute. *Reno v. Koray*, 515 U.S. 50, 61, 115 S. Ct. 2021, 132 L.Ed.2d 46 (1995). Administrative program statements are afforded less deference than regulations because they are "merely internal guidelines [that] may be altered by the Bureau at will." *Koray v. Sizer*, 21 F.3d 558, 562 (3d Cir. 1994), *rev'd on other grounds sub nom., Reno v. Koray, supra*; *see also Martinez*, 164 F.3d at 1259-60. However, the court reiterates that on a question of statutory interpretation, no deference is due where the agency's "interpretation is . . . in conflict with the plain language of the statute." *Sisneros v. Booker*, 981 F. Supp. at 1376, *citing National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417, 112 S. Ct. 1394, 1401, 118 L.Ed.2d 52 (1992).

DISCUSSION

ENTITLEMENT TO EARLY RELEASE

Petitioner at least implies in his pro se petition that he has an entitlement to or liberty interest in early release under § 3621, which has been improperly infringed. It has been clearly held by the United States Supreme Court that a convicted person has no constitutional or inherent right to be conditionally released before the expiration of a valid sentence. *See Greenholtz v. Inmates of Nebraska Penal & Correctional*

Complex, 442 U.S. 1, 7, 99 S. Ct. 2100, 2103-04, 60 L.Ed.2d 668 (1979). Nor does § 3621(e)(2)(B) create a liberty interest. *Fristoe*, 144 F.3d at 630. The language of the statute is not mandatory. It provides that the inmate's sentence "*may* be reduced by the Bureau of Prisons." (emphasis added). A statute which allows a decisionmaker to deny the requested relief within its unfettered discretion does not create a constitutionally-recognized liberty interest. *See Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S. Ct. 1741, 1747-48, 75 L.Ed.2d 813 (1983). The court concludes that petitioner's claim of an entitlement to early release under § 3621(e) has no legal merit.

VIOLATION OF FRISTOE

Petitioner's more substantial claim is that the denial of his application for sentence reduction exceeded the discretionary authority granted the Bureau of Prisons under 18 U.S.C. § 3621(e)(2)(B). The court finds that the BOP's denial of eligibility for sentence reduction based on P.S. 5162.02 is in violation of *Fristoe* and may not stand. The court proceeds to determine whether denial under the current, revised regulation and P.S. 5162.04 is proper.

Applying the revised regulation, 28 C.F.R. § 550.58 (1998), to Ward, it is accepted that he "successfully completed a DATP on or after October 1, 1989." In addition, it is generally accepted that his drug trafficking offenses are, without more, considered to be non-violent. Even though Ward meets these conditions of the 1998 regulation, he apparently does not qualify under the BOP's former or current interpretation as a prisoner who has been "convicted of a nonviolent offense."

Interpreting the phrase "convicted of a nonviolent offense," the revised regulation disqualifies inmates whose current offense has an element of actual or threatened force, or that by its nature or conduct presents a serious potential risk of physical force. As noted, these exclusions are retained from the former rules derived from 924(c)(3). 28 C.F.R. § 550.58(a)(1)(vi)(A) & (C) (1998). New language in the regulation disqualifies inmates, in addition, whose current offense "involved" possession of a weapon. 28 C.F.R. § 550.58(a)(1)(vi)(B). A district court very recently opined that:

> In effect, the BOP has . . . incorporated into the revised regulation the language of the sentence enhancement for possession of a firearm, language that previously was in Program Statement 5162.02.

Hicks v. Brooks, 28 F.Supp.2d 1268, 1271-72 (D. Colo. 1998). This court disagrees that the added language incorporates sentence enhancements. Instead, the new regulation simply adds a provision expressly excluding crimes such as felon in possession of a firearm. The Tenth Circuit in *Martinez* suggested as much with its observation that the current "550.58 looks to inmates' actual criminal convictions and does not attempt to convert something else, such as a sentencing enhancement, into a conviction." *Martinez*, 164 F.3d at 1260-61.

However, even if this court agreed with *Hicks* that the BOP intends by provision (B) in its regulation to exclude inmates with sentence enhancements for possession and not just weapons convictions, it would have no difficulty holding under the reasoning in *Fristoe* that the regulation so interpreted would conflict with the plain language of 18 U.S.C. § 3621(e)(2)(B). To either

promulgate or interpret regulatory language as allowing exclusion on the basis of sentence enhancements abrogates the word "convicted" in the statute and exceeds the authority given the BOP.

In any case, the BOP did not cite the regulation as the basis for its finding on administrative appeal that petitioner's offense is a crime that excludes him from early release. The BOP cited Program Statement 5162.02 as authority for finding Ward ineligible based upon his sentencing enhancements. Reliance on sentencing enhancements conflicts with the plain language of the statute whether attempted by regulation or program statement. The court concludes that both Section 9 of 5162.02, and the portion of Section 7(b), P.S. 5162.04 which provides that an inmate convicted of a violation of 21 U.S.C. §§ 841 & 846 is excluded based upon sentencing enhancements, conflict with the enabling statute. Consequently, neither can be applied to deny petitioner the early release benefit of § 3621(e)(2)(B).

This court further finds that, like P.S. 5162.02, Section 7(b) of P.S. 5162.04 as to sentencing enhancements is contrary to the rationale of *Fristoe*. In its subsequent *Martinez* opinion, the Tenth Circuit described its reasoning in *Fristoe* as that § 3621(e)(2)(B) simply does not authorize BOP to treat sentence enhancements or factors as if they were "convictions." *Martinez v. Flowers*, 164 F.3d at 1260. The court further commented:

> In other words, if the prisoner has not been convicted of a violent offense, BOP cannot use sentencing factors or enhancements to convert a

> nonviolent offense into a violent one for purposes of § 3621(e)(2)(B).

Id. at 1260. This court is compelled by the rationale in *Fristoe* to find that the BOP has improperly denied early release to petitioner, under either P.S. 5162.02 or 5162.04, on the sole basis of sentence enhancements.

The changes made by the BOP to its regulation and program statements have not rendered *Fristoe* irrelevant. There are no significant differences in the current overall scheme of release determinations from that examined in *Fristoe*. Moreover, the specific revisions to section 550.58, such as deleting the statute number 18 U.S.C. § 924(c)(3), but adding the text of the statute to the regulation along with provision (B), are not shown to have enlarged the BOP's discretion regarding sentence enhancements as it was interpreted in *Fristoe*.

Likewise, as demonstrated, the provisions of the new program statement which the court assumes have been applied to petitioner are not significantly different from P.S. 5162.02. P.S. 5162.04 contains substantially the same paragraph and example specifying that a two-level sentencing enhancement for possession of a firearm attached to a conviction under 21 U.S.C. §§ 841 or 846 requires a denial of early release. These provisions in P.S. 5162.02 were cited by the warden in his denial of Ward's BP-9. Changing the title of the program statement from "Definition of Term, Crimes of Violence" to "Categorization of Offenses" did not correct the statutory misinterpretation found in *Fristoe*. Nor did excluding drug trafficking offenses with enhancements as "an exercise of the discretion vested in the Director," rather than "crimes of violence."

The limit to the director's discretion by the statutory phrase "convicted of a nonviolent offense" survived these changes. The director still does not have discretion to treat a nonviolent offense as a violent offense based on sentencing enhancements. As was stated in *Hicks* on this precise issue:

> The intent of Congress in enacting 18 U.S.C. § 3621(e)(2)(B) is clear. The statute refers to a nonviolent offense and does not contemplate the consideration of any sentencing factors. Although the Tenth Circuit decided *Fristoe* based upon the former 28 C.F.R. § 550.58 and Program Statement 5162.02, not the 1997 revised regulation, the logic and rationale of *Fristoe* apply to the revised regulation as well.

Hicks v. Brooks, 28 F. Supp.2d at 1271-72.

The reasoning of *Fristoe* applies to this case and entitles Ward to relief. The narcotics offenses under §§ 841(a)(2) and 846, including Ward's predicate offenses—possession with intent to distribute and distribution of heroin—are generally held to constitute nonviolent offenses. The "operative word" of § 3621(e)(2)(B) is "convicted." Thus, Ward was "convicted of a nonviolent offense." Section 3621(e)(2)(B) addresses the act of convicting, not sentencing or sentence enhancement factors. Even though a less deferential standard was applied when P. S. 5162.02 was invalidated in *Fristoe*, and "full Chevron deference" is due the new regulation, this court finds that under the higher standard the denial of early release to Ward based solely on sentencing enhancements is still a violation of the plain language of 18 U.S.C. § 3621(e)(2)(B). The BOP continues to err "by conflating the guilt-finding

process, which is reflected in the statutory language "convicted," with the punishment process, which is reflected in the Bureau's program statements referring to sentencing guidelines." *Downey v. Crabtree*, 100 F.3d at 665.

BOP DISCRETION

From the foregoing, it is clear that *Fristoe* pronounced and enforced a limitation on the BOP's discretion to deny the early release benefit. That limitation derives from the plain language of the statute and requires the BOP to look to convictions rather than sentencing enhancements or factors. The BOP heretofore has recognized only those limits which go to its discretion to grant early release. The limit on its discretion to deny the release benefit has consequently not been adequately implemented in the BOP's regulation or program statement. The BOP's decision to deny early release to Ward on the basis of either Section 9 of P.S. 5162.02 or Section 7(b) of P.S. 5162.04 is contrary to that limitation.

However, the court emphasizes that the discretion granted to the Bureau of Prisons by the statute's language is otherwise quite broad. *See Martinez* 164 F.3d at 1260. Without question, the BOP has broad discretion over the entire drug treatment process within the federal corrections system, beginning with determining which inmates ever enter substance abuse programs. *Crabtree*, 100 F.3d at 666. Like the drug treatment placement decisions, decisions regarding whether to grant or deny eligible inmates a sentence reduction under § 3621(e) remain within the Bureau's discretion. *Crabtree*, at 671. While eligibility for early release under § 3621(e)(2)(B) is open to all prisoners who meet

the statutory requirements, the statute vests the BOP with broad discretion to grant or deny sentence reductions to eligible prisoners[7]. *LaSorsa*, 2 F. Supp.2d at 553-55; *Jacks*, 114 F.3d at 984.

In the recent, well-written opinion of *LaSorsa v. Spears*, the United States District Judge cited portions of the legislative history of the early release program's enactment as part of the VCCLEA and found that the provisions as introduced in both the House and Senate contained no limitations whatsoever on the BOP. He noted that the Senate amended its version of the bill to change the language in paragraph (B) from "prisoner" to "a prisoner convicted of a nonviolent offense" with no discussion. *See LaSorsa*, 2 F. Supp.2d at 554 citing, 139 Cong. Rec. S15030-70 (daily ed. Nov. 11, 1993). The judge further noted that the floor debates in the House of Representatives make it clear that substantial discretion was intended to vest in the BOP.[8]

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[7] As noted in *Jacks*, 114 F.3d at 984, by providing that a sentence "may be reduced," the statute gives the Bureau broad discretion to grant or deny reduction. This conclusion is reinforced by the preceding section of the enabling statute, which states that any prisoner who completes a drug treatment program "shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate." 18 U.S.C. § 3621(e)(2)(A).

[8] Both the chair and the ranking member of the Crime and Criminal Justice Subcommittee of the House Judiciary Committee stressed, in response to concerns over the early release program, that release was not guaranteed but was up to BOP. *See* 139 Cong. Rec. H8728 (daily ed. Nov. 3, 1993) (statement of Rep. Schumer) ("[T]his is not mandatory time off, it is an option, up to the prison authorities."), 139 Cong. Rec. H8724 (daily ed. Nov. 3, 1993) (statement of Rep. Sensenbrenner) ("[T]hat is in the discretion of the Bureau of Prisons on whether or not the prisoner's term ought to be reduce [sic] upon completion of the program."). *See* FN2 and

The judge in *LaSorsa* stated his opinion that the BOP "certainly has, under the statute, the ability to deny early release to prisoners, the attendant circumstances of whose convictions involved weapons possession, . . . even though they were not convicted of a weapons offense." *Id.* at 555. The court reasoned:

> It is important to realize, however, that such considerations are proper not as an exercise in statutory interpretation by BOP—i.e., not as a matter of defining the phrase "convicted of a nonviolent offense" under § 924(c)(3)— but rather as an exercise of the discretion granted by the statute to determine who, among those convicted of a nonviolent offense, will be given early release.

LaSorsa, 2 F. Supp.2d at 556. The judge in *LaSorsa* noted that it is this distinction which some of the case law from other circuits fails to clearly articulate. *Id.*

This court disagrees with this dicta in *LaSorsa*. Here, petitioner is eligible under section 3621(e)(2)(B), but ineligible under the BOP's program statements creating an additional eligibility requirement. The BOP certainly has authority to create additional eligibility requirements, even ones not suggested by the statute which is largely silent as to criteria. However, the BOP does not have authority to create an additional eligibility requirement which conflicts with the plain language of the statute. This court's holding is limited to invalidating the improper eligibility requirement based upon sentencing enhancements.

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further discussion of legislative history therein. *LaSorsa*, 2 F. Supp.2d at 554.

The BOP's main argument in *LaSorsa* was that because it has broad discretion under § 3621(e) to determine which prisoners are granted early release, it has the discretion to define the statutory terms however it believes will best serve its objectives. Considering this position, the judge in *LaSorsa* stated:

> This argument misses a crucial distinction. BOP does have broad discretion to determine which, among the class of "prisoners convicted of a nonviolent offense," will be granted early release and for how long (up to one year). BOP does not, however, have the "discretion" to interpret "prisoners convicted of a nonviolent offense" . . . in whatever way it chooses. These are statutory and regulatory terms whose meaning is quite clear, to the extent BOP has its own definitions of these terms, these interpretations are not permissible exercises of discretion but are instead statutory interpretations by an agency to which this court owes some deference only if not contrary to the statute's clear meaning.

LaSorsa, 2 F. Supp.2d at 560.

The BOP's interpretation of § 3621(e)(2)(B) in its program statements abrogating the statutory term "convicted" was not within its discretion and is entitled to no deference by this court.

RELIEF

The court concludes from the foregoing that petitioner was improperly denied eligibility for sentence reduction and is entitled to relief. This court does not have the authority to grant release under 18 U.S.C.

§ 3621(e)(2)(B). Instead, this matter must be referred to the Bureau of Prisons for reconsideration in accordance with this opinion. The BOP must determine whether there is any other basis for denying Ward early release under § 3621(e)(2)(B) or whether release should be granted within its discretion. *Roussos*, 122 F.3d at 164. The respondent is prohibited from denying sentence reduction to Ward solely on the basis of sentence enhancements. Respondent is granted until March 3, 1999 to reconsider Ward's application for early release, and to file a written report with the court as to the outcome of that reconsideration.

IT IS THEREFORE BY THE COURT ORDERED that the BOP reconsider petitioner for a sentence reduction without consideration of petitioner's sentencing enhancement, in accordance with this opinion.

IT IS FURTHER ORDERED that this court will retain jurisdiction over this matter to insure that petitioner's sentence reduction is promptly and appropriately reconsidered.

IT IS FURTHER ORDERED that respondent reconsider James Ward for sentence reduction under 18 U.S.C. § 3621(e)(2)(B) before March 3, 1999 and file a status report no later than March 3, 1999 informing the court what action has been taken to comply with this order.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

No. 98-3260-RDR

JIMMY E. SCROGER, PETITIONER

v.

J.W. BOOKER, JR., RESPONDENT

[Filed: Feb. 10, 1999]

MEMORANDUM AND ORDER

ROGERS, District Judge.

This is a petition for writ of habeas corpus, 28 U.S.C. § 2241, filed by an inmate of the Federal Prison Camp, Leavenworth, Kansas. The issue to be resolved is whether a prisoner convicted of a nonviolent drug offense, whose sentence was enhanced for possession of a firearm, was legally deemed by the Director of the Bureau of Prisons to be ineligible to receive the sentence reduction made available under 18 U.S.C. § 3621(e)(2)(B) to prisoners convicted of "nonviolent offenses."

An Order to Show Cause issued. Respondents filed an Answer and Return, and petitioner filed a brief in response. Having considered all the pleadings and

attachments filed together with the relevant authorities, the court makes the following findings and order.

FACTS

The facts are not in dispute. Petitioner was sentenced in 1996 to a term of sixty-three months imprisonment for possession with intent to distribute methamphetamine, and attempt to manufacture methamphetamine, violations of 21 U.S.C. § 841(a)(1). At sentencing, the district court applied a two-level guideline enhancement of his offense level pursuant to U.S.S.G. § 2D1.1(b)(1) because Scroger was arrested at a residence where loaded, accessible firearms, as well as drugs, were discovered.

During his incarceration on October 27, 1997, Scroger participated in a "Comprehensive Drug Abuse Treatment Program" (DATP) and successfully completed the residential phase on July 1, 1998. Petitioner applied to the Bureau of Prisons (BOP) for a one-year reduction in his sentence. The BOP found Scroger "ineligible" for the reduction. A "Notification of Instant Offense Determination" (Doc. 8, Exhibit # 5) was issued on November 20, 1997 which stated that petitioner's "instant offense is a crime that excludes" him from early release under 18 U.S.C. § 3621(e). On this form, his offense was marked as a "crime of violence as contained in the Categorization of Offenses Program Statement[1]."

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[1] The other option on the form was a "Crime listed under the Director's Discretion as contained in the Categorization of Offenses Program Statement."

At the first level, Scroger's administrative remedy request for reconsideration was denied by the warden on the basis that:

> Program Statement 5162.04 . . . provides that defendants who receive an enhancement as a result of possession of firearms shall be ineligible to receive certain Bureau of Prisons program benefits . . . ."

Scroger was said to be "ineligible for consideration of a sentence reduction based on (his) possession of a weapon during the commission of the instant offense." His administrative appeals were denied for the general reason that under P.S. 5162.04, his offense was within the categories of offenses which in the Director's discretion were "excluded from eligibility." Scroger exhibits and respondent admits that administrative remedies have been exhausted. Scroger's mandatory release date is February 10, 2000, and he alleges that he would be entitled to immediate release if he were to receive the sentence reduction.

CLAIMS

Petitioner challenges the decision of the Bureau of Prisons as contrary to and in excess of the plain statutory language of 18 U.S.C. § 3621(e)(2)(B); an improper retroactive application to him of amendments of the BOP's regulations; and invalid under the recent opinion of the Tenth Circuit Court of Appeals in *Fristoe v. Thompson*, 144 F.3d 627 (1998).

JUDICIAL REVIEW

A threshold consideration is whether or not this court has jurisdiction. The Administrative Procedure Act's provisions for judicial review of agency action are expressly made inapplicable by 18 U.S.C. § 3625 to the BOP's decisions regarding sentence reduction under § 3621(e). *See e.g., LaSorsa v. Spears*, 2 F. Supp.2d 550, 558 (S.D.N.Y. 1998); *Martin v. Gerlinski*, 133 F.3d 1076, 1079 (8th Cir. 1998); *Davis v. Beeler*, 966 F.Supp. 483, 489 (E.D. Ky. 1997). However, the Tenth Circuit has stated that while § 3625 may preclude the courts from reviewing the BOP's substantive decisions in these cases, it does not prevent the court from interpreting the statute to determine whether the BOP exceeded its statutory authority or violated the Constitution. *See Fristoe*, 144 F.3d at 630-31; *Crawford v. Booker*, 156 F.3d 1243, 1998 WL 567963, * 1, n. 3 (10th Cir. 1998) (unpublished); *see also Martin*, 133 F.3d at 1076. Moreover, through habeas corpus this court may inquire into the legality under federal law of a prisoner's detention. *See e.g., Downey v. Crabtree*, 100 F.3d 662, 664 (9th Cir. 1996); *Roussos v. Menifee*, 122 F.3d 159, 161, n. 3 (3d Cir. 1997) (district court jurisdiction under § 2241 and 28 U.S.C. § 1331); *see also, Fuller v. Moore*, 133 F.3d 914 (4th Cir.1997, (unpublished, per curiam, Table); *Venegas v. Henman*, 126 F.3d 760, 761 (5th Cir. 1997), *cert. denied*, —— U.S. ——, 118 S. Ct. 1679, 140 L.Ed.2d 817 (1998); *Orr v. Hawk*, 156 F.3d 651 (6th Cir. 1998); *Pearson v. Helman*, 103 F.3d 133 (7th Cir. 1996), unpublished); *Sesler v. Pitzer*, 110 F.3d 569 (8th Cir.) *cert. denied*, —— U.S. ——, 118 S. Ct. 197, 139 L.Ed.2d 135 (1997); *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *LaSorsa*, 2 F. Supp.2d at 559. In each of the cited cases the BOP's interpretation of eligibility for sen-

tence reduction under § 3621 was reviewed in a habeas corpus context.

The issues presented are purely legal. Consequently, an evidentiary hearing is not necessary.

ENABLING STATUTE—VCCLEA

The court begins by considering the statute which petitioner claims entitles him to early release, 18 U.S.C § 3621(e)(2). As part of the Crime Control Act of 1990, Congress required the BOP to "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." 18 U.S.C. § 3621(b). A few years later, to provide a new incentive to federal prisoners to enroll in and complete the BOP's drug treatment programs, Congress authorized the Bureau under § 3621(e)(2)(B) of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), to reduce the sentences of eligible prisoners who completed a drug treatment program. The VCCLEA, promulgated in November, 1994, provides in pertinent part:

> (2) Incentive for prisoners' successful completion of treatment program.—
>
> (A) Generally.—Any prisoner who, in the judgment of the Director of the [BOP], has successfully completed a program of residential substance abuse treatment . . ., shall remain in the custody of the [BOP] under such conditions as the [BOP] deems appropriate. . . .
>
> (B) Period of custody.—The period a prisoner convicted of a nonviolent offense remains in custody

> after successfully completing a treatment program may be reduced by the [BOP], but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621(e)(2). On its face, the statute unambiguously precludes the early release of prisoners convicted of violent offenses and limits reduction to one year or less for other prisoners having completed a drug abuse treatment program. *See LaSorsa*, 2 F. Supp.2d at 554.

BOP REGULATIONS AND PROGRAM STATEMENTS

Congress defined several terms in § 3621(e), but did not define "nonviolent offense." Nor does the statute specify criteria for awarding a reduction. *Byrd*, 142 F.3d at 1396; *see also Fristoe*, 144 F.3d at 631; *Martin*, 133 F.3d at 1078. Respondent explains in its Answer and Return (Doc. 8 at 6-7) that because of these gaps in the statute, and because the legislative history[2] of the statute left to the Bureau of Prisons the discretion to implement the program, the BOP developed criteria to determine which inmates would be eligible for early release.

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[2] Congress left to the discretion of the BOP the determination of how to implement the specifics of the program:

> In effect, this subparagraph [(e)(2)(B)] authorizes the BOP to shorten by up to one year the prison term of a prisoner who has successfully completed a treatment program, based on the criteria to be established and uniformly applied by the BOP.

H.R. 3350, 103d Cong. § 1 (passed by House Nov. 3, 1993) H.R. Rep. 103-320 (1993).

28 C.F.R. § 550.58 (1996)

First, respondent states, the BOP "published an interim rule on May 25, 1995," [*citing* 60 Fed. Reg. 27695 (1995)], "codified at 28 C.F.R. § 550.58," which defined "nonviolent offense" as the converse of "a crime of violence." Under this rule, the qualification of "convicted of a nonviolent offense" was implemented by excluding from eligibility, among others, those persons whose current offense is determined to be a crime of violence as defined in 18 U.S.C. § 924(c)(3)[3]. In other words, the regulation did two things: (1) as a matter of statutory interpretation, it defined "prisoner convicted of a nonviolent offense" in § 3621(e)(2)—the type of prisoner the BOP is not forbidden to release early—to mean a prisoner whose "current offense" does not meet the definition of "crime of violence" in 18 U.S.C. § 924(c)(3). *LaSorsa*, 2 F. Supp.2d at 557. Second, it laid out certain criteria under which the BOP would categorically refuse to exercise its discretion to grant early release. *Id.*

PROGRAM STATEMENT 5330.10

At about the same time, the BOP published Program Statement 5330.10, *Drug Abuse Programs Manual,*

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[3] Section 924(c)(3) defines a crime of violence as:

> an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Inmate, in the Federal Register setting forth guidelines for drug abuse treatment services (effective June 26, 1995). This Program Statement contains provisions on eligibility for early release in Chapter 6 (amended May 17, 1996 and October 9, 1997) which merely reiterate (and have changed with) the contents of the regulation.

PROGRAM STATEMENT 5162.02

On July 24, 1995, an additional Program Statement was adopted, P.S. 5162.02[4], *Definition of Term, "Crimes of Violence"*, to further interpret the language of the interim rule regarding the definition of the term "crime of violence" from Section 924(c)(3). Doc. 8 at 7. Section 5 of this program statement presented the "statutory definition" of "crime of violence" citing § 924(c)(3).

- Section 9 of Program Statement 5162.02 enumerated various offenses in the United States Code, including 21 U.S.C. § 841, which "may be crimes of violence depending on the specific offense characteristic assigned." Section 9 provided:

> At the time of sentencing, the court makes a finding if the offense involved violence, and this finding is reflected in the Presentence Investigation Report section entitled "Offense Computation," under the subsection entitled "Specific Offense Characteristics."

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[4] P.S. 5162.02 does not apply to petitioner. P.S. 5330.10 states that as of October 9, 1997 the new rule and P.S. 5162.04 supersede the old policy, namely P.S. 5162.02, "with respect to inmates who had not yet begun participation in the residential phase of RDAP." Scroger began program participation on October 27, 1997.

An example is then given:

> Section 841 of Title 21, [U.S.C.] makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11) the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic," e.g., if a dangerous weapon was possessed during the commission of the offense, the court would increase the defendant's base offense by 2 levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a substantial risk that force may be used against persons or property. Accordingly, a defendant who has received a conviction for manufacturing drugs . . . and receives a two-level enhancement for possession of a firearm has been convicted of a "crime of violence."

Respondent notes that "inmates nationwide" then "began challenging the regulations and program statements implementing the early release provisions of the drug treatment program," and that "several appellate courts invalidated select provisions of Program Statement 5162.02." Doc. 8 at 7-8.

REVISED REGULATION 28 C.F.R. § 550.58 (1998)

Respondent further instructs that the BOP responded to the controversy surrounding its first rule by adopting a revised regulation, 28 C.F.R. § 550.58 (1998), on October 9, 1997, which underwent notice and comment, *citing* 62 Fed. Reg. 53,690. Respondent asserts that a "significant change" in the new regulation is that

it no longer cites 18 U.S.C. § 924(c)(3) for its definition[5] of the term "crime of violence."

The amended version of § 550.58 identifies three statutory prerequisites for eligibility: sentenced for a nonviolent offense, determined to have a substance abuse problem, and successful completion of the drug abuse treatment program. In the new regulation, the Director of the BOP no longer defines or even mentions the term "crime of violence." Instead, she precludes categories of inmates from early release as an exercise of her discretion. Those excluded, among others, are inmates whose current offense is a felony:

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[5] One court described the definition in the amended 550.58 and identified its source as:

> an amalgam of different United States Code sections, rather than merely drawing from § 924(c)(3). This now includes the § 924(c)(3) language virtually verbatim, but additionally provides, in relevant part, that "[i]nmates whose current offense is a felony . . . [t]hat involved the carrying, possession or use of a firearm or other dangerous weapon or explosives" are ineligible for early release. 28 C.F.R. § 550.58. The former 42 U.S.C. § 3796ii-2 contained remarkably similar language, defining a "violent offender" as one who "is charged with or convicted of an offense, during the course of which offense or conduct . . . [the accused] carried, possessed, or used a firearm or dangerous weapon. . . ." (repealed 1996). The BOP has at least implicitly acknowledged in other litigation that its new definition of crime of violence derives from the repealed statute. *Sesler v. Pitzer*, 110 F.3d 569, 571-72 (8th Cir.), *cert. denied*, —— U.S. ——, 118 S. Ct. 197, 139 L.Ed.2d 135 (1997); *Davis v. Crabtree*, 109 F.3d 566, 569-70 (9th Cir. 1997).

Orr v. Hawk, 156 F.3d at 651, 653.

(A) that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another, or

(B) that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or

(C) that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or

(D) that by its nature or conduct involves sexual abuse offenses committed upon children.

28 C.F.R. § 550.58(a)(1)(vi)(1998). Paragraphs (A) and (C) are the same as § 924(c)(3).

NEW PROGRAM STATEMENT 5162.04

The BOP further clarified its interpretation of the enabling statute and its revised regulation through issuance of its Program Statement 5162.04 entitled "Categorization of Offenses" (effective October 9, 1997). Section 7 of P.S. 5162.04 appears to be the one applicable to petitioner[6] even though it is not specified in the administrative record. Section 7 begins:

As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.

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[6] Section 6(a) lists numerous offenses categorized as "crimes of violence in all cases." Petitioner's offense is not on this list.

Thereafter it also essentially recites the language, but not the section number, of § 924(c)(3).

Subsection (b) of P.S. 5162.04 provides in relevant part:

> *Criminal Offenses with a Specific Offense Characteristic Enhancement.*
>
> * * * * * *
>
> At the time of sentencing, the court makes a finding of whether the offense involved the use or threatened use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Specific Offense Characteristics." This subsection references a particular U.S. Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

The following example, very similar to the one in section 9 of P.S. 5162.02, is set forth in the revised regulation:

> Section 841 of Title 21, United States Code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11), the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic" (for example, if a dangerous weapon was possessed during commission of the offense), the court would increase the defendant's base offense level by two levels. This particular "Specific Offense Characteristic" (possession of a dangerous

> weapon during the commission of a drug offense) poses a serious potential risk that force may be used against persons or property. Specifically, as noted in the U.S. Sentencing Guidelines § 2D1.1., application note 3, the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21 U.S.C. § 841) and received a two-level enhancement for possession of a firearm, has been convicted of an offense that will preclude the inmate from receiving certain Bureau program benefits.

Next in subsection (b) is a list of "offenses for which there could be a Specific Offense Characteristic enhancement for the use of force." Paragraph (3) of subsection (b) includes "Title 21 U.S.C. § 841 (NOT (e)), controlled substance violation."

Thus, the current program statement no longer classifies a drug offense with enhancements for firearms possession as a "crime of violence" under § 924(c)(3), but categorizes it as an offense committed with such risk of force that the Director in her discretion shall deny eligibility. The revised P.S. 5162.04 instructs BOP officials that:

> if an inmate is convicted of an offense listed in Section 7 [corresponding to previous section 9 of 5162.02], the inmate should be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.

P.S. 5162.04, ¶ 5. Under Section 7(b)(3) of the Program Statement and under the revised regulation, then,

petitioner's crime was not nonviolent, due to behavior underlying the sentencing enhancement which "increased the danger of violence." Scroger was therefore denied eligibility for the sentence reduction.

FRISTOE

In April, 1998, the United States Court of Appeals for the Tenth Circuit held under similar facts that the BOP may not categorically exclude from consideration for early release upon completion of a drug treatment program an inmate convicted of a nonviolent offense whose sentence was enhanced for possession of a weapon. *See Fristoe*, 144 F.3d at 631. *Fristoe* is controlling authority in this court. The rationale of the *Fristoe* court was that:

> Reliance on sentencing enhancements . . . conflicts with the plain language of the statute. Section 3621(e)(2)(B) refers to prisoners "convicted of a nonviolent offense." The statute does not permit resort to sentencing factors or sentencing enhancements attached to the nonviolent offense.
>
> * * * * * *
>
> . . . The eligibility criteria in 18 U.S.C. § 3621(e)(2)(B) refer directly to the offense for which the prisoner was convicted.

Fristoe, 144 F.3d at 631.

Respondent correctly points out that *Fristoe* was decided on the petition of an inmate whose early release had been denied under the old regulation and P.S. 5162.02. Respondent asserts that *Fristoe* is irrelevant to the instant action which is governed by the amended

regulation and P.S. 5162.04. This court of necessity has reviewed the prior regulation and program statements and the case law considering those provisions to determine the differences and whether or not the amended provisions applicable to this case are free of the statutory misinterpretation found in *Fristoe*.

OTHER CASE LAW

As respondent noted, there has been a spate of recent cases brought by inmates challenging the BOP's denial of their requests for the early release benefit of 3621(e)(2)(B). Almost all dealt with the old regulation and P.S. 5162.02, and held like *Fristoe* that the BOP misinterpreted 18 U.S.C. § 3621(e)(2)(B). Several courts emphasized that the statute speaks only in terms of conviction and effectively construed this as an additional statutory limit on the BOP's discretion.

The Third Circuit, for example, found that the first regulation promulgated by the BOP and P.S. 5162.02 were contrary to § 3621(e)(2)(B). In its view:

> The statute speaks clearly and unambiguously. The operative word of § 3621(e)(2)(B) is "convicted." . . . . (Petitioner) was convicted of a drug-trafficking offense, which is not a crime of violence. Section 3621(e)(2)(B) addresses the act of convicting, not sentencing or sentence-enhancement factors. The Bureau erred by conflating the guilt-determination (conviction) and sentencing processes.

Roussos, 122 F.3d at 162. The *Roussos* court observed that under the statute, petitioner "is eligible in the

absence of his conviction for a nonviolent offense or a crime of violence, neither of which occurred." *Id.*

The Eighth Circuit reached a similar result by reasoning that:

> The operative word in § 3621(e)(2)(B) is "convicted," thus requiring the BOP to look to the offense of conviction itself to determine whether it meets the definition of a "nonviolent offense"; § 3621 does not address sentencing or sentencing-enhancement factors. Here, appellants' convictions were for drug trafficking offenses, which are not crimes of violence.

Martin, 133 F.3d at 1079. The court determined that "the inclusion of sentencing enhancement factors in the determination of what is a 'nonviolent offense' is not a permissible interpretation of the statute." *Id.*

The Eleventh Circuit reasoned that convictions of violations of 21 U.S.C. §§ 846 and 841(a)(1) are not crimes of violence, and that "although (petitioner) received a sentencing enhancement under § 2D1.1(b)(1), section 3621(e)(2)(B) addresses the act of convicting, not sentencing or sentence-enhancement factors." *Byrd v. Hasty*, 142 F.3d at 1397. The court concluded that the "BOP's interpretation . . . is simply in conflict with the statute's plain meaning." *Id.*

The Fourth Circuit stated in *Fuller v. Moore*, 1997 WL 791681, *3, *citing Downey*, 100 F.3d at 668: "The relevant statute speaks clearly and unambiguously. The operative word of § 3621(e)(2)(B) is 'convicted'." The court in *Fuller* found that the "BOP's interpretation contravenes the language of the statute which

refers to a 'convicted' person rather than to the 'commission' of an offense[7]."

The Ninth Circuit in *Downey* found that the BOP "departed from traditional methods of statutory construction" in its interpretation of the phrase "convicted of a nonviolent offense" and instead adopted "a unique statutory interpretation technique" to conclude "that inmates are 'convicted of a nonviolent offense' if they did not commit a crime of violence as determined only after considering various Sentencing Guideline factors that may or may not be directly related to the crime for which the inmate was convicted." *Downey v. Crabtree*, 100 F.3d at 666. The *Downey* court held that possession of a controlled substance with intent to sell, 21 U.S.C. § 841(a)(1), the predicate offense here and in *Downey*, is a nonviolent offense. *Id.* at 668.

The *Downey* court reasoned that the BOP's interpretation of § 3621(e)(2)(B) runs counter to the teachings of *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990) as follows:

> There the Court "require[d] the trial court to look only to the fact of conviction and the statutory definition of the prior offense" in determining whether petitioner's prior burglary offense constituted a previous "conviction of a violent felony" for purposes of a sentencing enhancement statute. *Id.*, at 602, 110 S. Ct. at 2160. The Bureau in this case relied on sentence-enhancement devices and related staff considerations, factors external to the

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[7] The Fourth Circuit subsequently upheld the revised regulation in the published decision of *Pelissero v. Thompson*, 155 F.3d 470 (1998) without distinguishing or overturning *Fuller*.

> constituent elements of the crime of conviction, to define "a nonv[illegible]lent offense" for the purposes of 18 U.S.C. § 3621(e)(2)(B). Reliance on such external factors flies in the face of the *Taylor* analysis.

Downey, 100 F.3d at 669.

In an opinion cited by the Tenth Circuit in *Fristoe*, the United States District Court for the District of Colorado held that:

> [S]ection 3621 plainly allows eligibility for persons "convicted of a nonviolent offense." Section 9 of the Program Statement (5162.02) purports to look past the conviction, however, and determine whether a weapon was involved, regardless of the conviction. Admirably, BOP's Program Statement attempts to take a more comprehensive view of whether a prisoner constitutes a risk of violence, which arguably furthers the important policy of weighing early release against concerns for public safety. Nevertheless, BOP may not rewrite the statute. Congress is presumed to mean what it says, and BOP's interpretation of § 3621 abrogates the word "convicted."

Sisneros v. Booker, 981 F. Supp. 1374, 1376 (D. Colo. 1997).

Of utmost importance to this court is the *Fristoe* decision by the Tenth Circuit. The petitioner in *Fristoe* was convicted of violating the same statute and received the same sentencing enhancement as Scroger. The *Fristoe* court noted that "courts typically do not consider" conspiracy to distribute cocaine, a "crime of violence." *Fristoe*, 144 F.3d at 631. The court held that

"the statute does not permit resort to sentencing factors or sentencing enhancements attached to the nonviolent offense." *Id.*

The Tenth Circuit disagreed with the position taken by the Fifth Circuit in *Venegas*, 126 F.3d 760, that

> the use of the phrase "a nonviolent offense" merely excludes all inherently violent offenses from eligibility for consideration, while leaving to the Bureau's discretion the determination of which other offenses will or will not be eligible for consideration.

Fristoe, 144 F.3d at 632. The Tenth Circuit stated that the Fifth Circuit's position "would permit the BOP to treat nonviolent offenders as though they were convicted of a violent offense, undermining the express language of the statute." *Id.* The *Fristoe* court summarized its own holding as: "any resort to sentencing factors in the absence of conviction of an offense which constitutes a crime of violence is impermissible. . . ." *Id.* at FN3.

Respondent would apparently have us disregard all the aforementioned reasoning and case law on the basis that the BOP has promulgated and amended regulations and program statements containing newly worded interpretations of the early release statute. Respondent asserts that its revised regulation and program statements relegate these cases to a "mostly of historic interest" status. Doc. 8 at 9. To the contrary, this court finds that the statutory language interpreted in *Fristoe* has not changed at all, so that these cases remain quite relevant.

There are other cases besides *Venegas* which have upheld decisions of the BOP to deny early release despite challenges to the former regulation and P.S. 5162.02. However, this court finds that the circumstance of actually having a conviction for possession of a firearm such as in *Bush v. Pitzer*, 133 F.3d 455 (7th Cir. 1997) and *Love v. Tippy*, 133 F.3d 1066 (8th Cir.) *cert. denied*, —— U.S. ——, 118 S. Ct. 2376, 141 L.Ed.2d 743 (1998); or of a prior violent offense such as in *Martinez v. Flowers*, 164 F.3d 1257 (10th Cir. 1998), *Stiver v. Meko*, 130 F.3d 574 (3d Cir. 1997) and *Jacks v. Crabtree*, 114 F.3d 983 (9th Cir. 1997), *cert. denied*, —— U.S. ——, 118 S. Ct. 1196, 140 L.Ed.2d 325 (1998), clearly distinguishes those cases from the instant action.

There are also cases which, even with a distinguishing circumstance, have held that the BOP has misinterpreted the statute. *See e.g., Royce v. Hahn*, 151 F.3d 116 (3d Cir. 1998) (convictions for firearm possession); *Davis v. Crabtree*, 109 F.3d 566 (9th Cir. 1997) (same); *McPeek v. Henry*, 17 F. Supp.2d. 443 (D. Md. 1998) (same). These courts rely heavily on "well-established" case law in their respective circuits holding that mere possession of a firearm by a felon is not a "crime of violence" under 18 U.S.C. § 924(c)(3).

In *Fristoe*, no such precedent was relied upon since the Tenth Circuit had not decided the firearms issue. The rationale that mere possession is nonviolent was mentioned only in a footnote. In *Fristoe*, the primary ground for decision was that the BOP exceeded its statutory authority.

LEGAL STANDARDS

At the outset, the court notes that petitioner's entitlement to relief depends on his showing that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Scroger contends that the regulation and program statement applied to deny his application for early release are contrary to federal law, namely 18 U.S.C. § 3621(e)(2)(B).

Respondent contends that its interpretation of section 3621(e)(2)(B) in its revised regulation is entitled to "full deference." The Tenth Circuit has instructed that the BOP's formal regulation interpreting this statute is entitled to "full Chevron deference," unlike its previous informal program statement. *See Martinez*, 164 F.3d at 1258, *citing Fristoe*, 144 F.3d at 631. Properly promulgated regulations have the force of law and may themselves limit the BOP's own discretion further than the statute. *LaSorsa*, 2 F. Supp.2d at 556.

In reviewing an agency's interpretation of a statute through a formal regulation, the court defers to the agency's interpretation if it is based on a permissible construction of the statute. *Martinez*, at 1258, *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). Regulations such as § 550.58 are normally reviewed under the two-step standard set out by the Supreme Court in *Chevron*; *Wottlin v. Fleming*, 136 F.3d 1032, 1035 (5th Cir. 1998). First, the court looks to the intent of Congress and, if it is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781-82. If, however, the language of the statute is ambiguous or silent on a particular issue, then the court turns to the second step of the analysis and "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2781. If the agency's regulatory interpretation is reasonable, it will receive controlling weight unless "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S. Ct. at 2782; *Martinez*, at 1259.

If 18 U.S.C. § 3621(e)(2)(B) is viewed as silent regarding the BOP's authority to deny early release to inmates who have received sentencing enhancements for firearm possession, the court must proceed to decide whether 28 C.F.R. § 550.58 (1998) represents a "permissible construction of the statute." *Pelissero v. Thompson*, 155 F.3d 470, 475 (4th Cir. 1998); *see also Martinez*, at 1259. On the other hand, if the intent of Congress is clear in § 3621(e)(2)(B), then the court must decide whether the BOP is giving it effect. Thus, either step of the standard leads the court in this case to determine whether the BOP's interpretation of the statute is a reasonable, permissible construction.

The Program Statement, as an internal agency guideline, is entitled to "some deference" if it is a permissible construction of the statute. *Reno v. Koray*, 515 U.S. 50, 61, 115 S. Ct. 2021, 132 L.Ed.2d 46 (1995). Administrative program statements are afforded less deference than regulations because they are "merely internal guidelines [that] may be altered by the Bureau at will." *Koray v. Sizer*, 21 F.3d 558, 562 (3d Cir. 1994), *rev'd on other grounds sub nom., Reno v. Koray, supra; see also*

Martinez, at 1258. However, the court reiterates that on a question of statutory interpretation, no deference is due where the agency's "interpretation is . . . in conflict with the plain language of the statute." *Sisneros v. Booker*, 981 F. Supp. at 1376, *citing National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417, 112 S. Ct. 1394, 1401, 118 L.Ed.2d 52 (1992).

DISCUSSION

ENTITLEMENT TO EARLY RELEASE

Petitioner at least implies in his pro se petition that he has an entitlement to or liberty interest in early release under § 3621, which has been improperly infringed. It has been clearly held by the United States Supreme Court that a convicted person has no constitutional or inherent right to be conditionally released before the expiration of a valid sentence. *See Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 2103-04, 60 L.Ed.2d 668 (1979). Nor does § 3621(e)(2)(B) create a liberty interest. *Fristoe*, 144 F.3d at 630. The language of the statute is not mandatory. It provides that the inmate's sentence "*may* be reduced by the Bureau of Prisons." (emphasis added). A statute which allows a decisionmaker to deny the requested relief within its unfettered discretion does not create a constitutionally-recognized liberty interest. *See Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S. Ct. 1741, 1747-48, 75 L.Ed.2d 813 (1983). The court concludes that petitioner's claim of an entitlement to early release under § 3621(e) has no legal merit.

ILLEGAL RETROACTIVE APPLICATION

Scroger's assertion that certain BOP rules may not be retroactively applied to him is also without merit. Scroger argues that since he committed his offense and was sentenced before the BOP adopted P.S. 5162.04 and Operations Memorandum 052-98 (5162), these provisions cannot now be applied to him.

The OM 052-98 (5162) referred to by petitioner was promulgated on July 1, 1998 in response to *Fristoe*. This memorandum by its own terms does not apply to Scroger because he was not participating in a DATP on or before October 9, 1997. As for P.S. 5162.04, it was promulgated on October 9, 1997, before petitioner entered the drug treatment program. *See Martinez*, at 1260, FN3.

In any event, there is no ex post facto violation here, because the challenged provisions did not affect the legal consequences of Scroger's crime or increase his punishment. *See Fristoe*, 144 F.3d at 630, *citing Stiver v. Meko*, 130 F.3d at 578 (rejecting similar argument). Moreover, the reduction of sentence afforded by § 3621(e)(2)(B) has never been held to be an automatic entitlement. Rather, it is authorized for qualifying inmates in the discretion of the Bureau of Prisons. *See Bush*, 133 F.3d at 457. Furthermore, the agency has been consistent in its interpretation of its regulation and enabling statute to include an enhanced drug offense as an excluded offense first as a "crime of violence" and then due to its risk of violence. Thus, the new provisions do not represent a change in position for the BOP, and accordingly might apply retrospectively. *Orr*, 156 F.3d at 654; *see also Bush*, 133 F.3d at 458.

VIOLATION OF FRISTOE

Petitioner's main claim is that the denial of his application for sentence reduction exceeded the discretionary authority granted the Bureau of Prisons under 18 U.S.C. § 3621(e)(2)(B). Applying the revised regulation, 28 C.F.R. § 550.58 (1998), to Scroger, it is conceded that he "successfully completed a DATP on or after October 1, 1989." In addition, it is generally accepted that his drug trafficking offenses are, without more, considered to be nonviolent. Even though Scroger meets these conditions of the 1998 regulation, he apparently does not qualify under the BOP's current interpretation as a prisoner who has been "convicted of a nonviolent offense."

Interpreting the phrase "convicted of a nonviolent offense," the revised regulation disqualifies inmates whose current offense has an element of actual or threatened force, or that by its nature or conduct presents a serious potential risk of physical force. As noted, these exclusions are retained from the former rules derived from 924(c)(3). 28 C.F.R. § 550.58(a)(1)(vi)(A) & (C) (1998). New language in the regulation disqualifies inmates, in addition, whose current offense "involved" possession of a weapon 28 C.F.R. § 550.58(a)(1)(vi)(B). A district court very recently opined that:

> In effect, the BOP has . . . incorporated into the revised regulation the language of the sentence enhancement for possession of a firearm, language that previously was in Program Statement 5162.02.

Hicks v. Brooks, 28 F. Supp.2d 1268, 1272 (D. Colo. 1998). This court disagrees that the added language

incorporates sentence enhancements. Instead, the new regulation simply adds a provision expressly excluding crimes such as felon in possession of a firearm. The Tenth Circuit in *Martinez* suggested as much with its observation that the current "550.58 looks to inmates' actual criminal convictions and does not attempt to convert something else, such as a sentencing enhancement, into a conviction." *Martinez*, at 1259.

However, even if this court agreed with *Hicks* that the BOP intends by provision (B) in its regulation to exclude inmates with sentence enhancements for possession and not just weapons convictions, it would have no difficulty holding under the reasoning in *Fristoe* that the regulation so interpreted would conflict with the plain language of 18 U.S.C. § 3621(e)(2)(B). To either promulgate or interpret regulatory language as allowing exclusion on the basis of sentence enhancements abrogates the word "convicted" in the statute and exceeds the authority given the BOP.

In any case, the BOP did not cite provision (B) in the regulation as the basis for its finding that petitioner's "offense is a crime that excludes him from early release." The BOP cited Program Statement 5162.04 as authority for finding Scroger ineligible based upon his sentencing enhancements. Reliance on sentencing enhancements conflicts with the plain language of the statute whether attempted by regulation or program statement. The court concludes that the portion of Section 7(b), P.S. 5162.04 which provides that an inmate convicted of a violation of 21 U.S.C. § 841 is excluded based upon sentencing enhancements, conflicts with the enabling statute and cannot be applied to deny petitioner the early release benefit of § 3621(e)(2)(B).

This court further finds that Section 7(b) as to sentencing enhancements is contrary to the rationale of *Fristoe*. In its subsequent *Martinez* opinion, the Tenth Circuit described its reasoning in *Fristoe* as that "§ 3621(e)(2)(B) simply does not authorize BOP to treat sentence enhancements or factors as if they were 'convictions.'" *Martinez v. Flowers*, at 1258. The court further commented:

> In other words, if the prisoner has not been convicted of a violent offense, BOP cannot use sentencing factors or enhancements to convert a nonviolent offense into a violent one for purposes of § 3621(e)(2)(B).

Id. at 1258. This court is compelled by the rationale in *Fristoe* to find that the BOP has improperly denied early release to petitioner under P.S. 5162.04 on the sole basis of sentence enhancements.

The changes made by the BOP to its regulation and program statements have not rendered *Fristoe* irrelevant. There are no significant differences in the overall scheme of release determinations applicable to petitioner from that examined in *Fristoe*. Moreover, the specific revisions to section 550.58, such as deleting the statute number 18 U.S.C. 924(c)(3), but adding the text of the statute to the regulation along with provision (B), are not shown to have enlarged the BOP's discretion regarding sentence enhancements as it was interpreted in *Fristoe*.

Likewise, the provisions of the new program statement applied to petitioner are not significantly different from P.S. 5162.02. P.S. 5162.04 contains substantially the same paragraph and example specifying that a two-

level sentencing enhancement for possession of a firearm attached to a conviction under 21 U.S.C. § 841 requires a denial of early release. Changing the title of the program statement from "Definition of Term, Crimes of Violence" to "Categorization of Offenses" did not correct the statutory misinterpretation found in *Fristoe*. Nor did excluding drug trafficking offenses with enhancements as "an exercise of the discretion vested in the Director," rather than "crimes of violence."

The limit to the director's discretion by the statutory phrase "convicted of a nonviolent offense" survived these changes. The director still does not have discretion to treat a nonviolent offense as a violent offense based on sentencing enhancements. As was stated in *Hicks* on this precise issue:

> The intent of Congress in enacting 18 U.S.C. § 3621(e)(2)(B) is clear. The statute refers to a nonviolent offense and does not contemplate the consideration of any sentencing factors. Although the Tenth Circuit decided *Fristoe* based upon the former 28 C.F.R. § 550.58 and Program Statement 5162.02, not the 1997 revised regulation, the logic and rationale of *Fristoe* apply to the revised regulation as well.

Hicks v. Brooks, 28 F. Supp.2d at 1271.

The reasoning of *Fristoe* applies to this case and entitles Scroger to relief. The narcotics offenses under § 841(a)(2), including Scroger's predicate offense—possession with intent to distribute methamphetamine—are generally held to constitute nonviolent offenses. The "operative word" of § 3621(e)(2)(B) is

"convicted." Thus, Scroger was "convicted of a nonviolent offense." Section 3621(e)(2)(B) addresses the act of convicting, not sentencing or sentence enhancement factors. Even though a less deferential standard was applied when P.S. 5162.02 was invalidated in *Fristoe*, and "full Chevron deference" is due the new regulation, this court finds that under the higher standard the decision to deny petitioner early release based solely on sentencing enhancements is still a violation of the plain language of 18 U.S.C. § 3621(e)(2)(B). The BOP continues to err "by conflating the guilt-finding process, which is reflected in the statutory language "convicted," with the punishment process, which is reflected in the Bureau's program statements referring to sentencing guidelines." *Downey v. Crabtree*, 100 F.3d at 665.

BOP DISCRETION

From the foregoing, it is clear that *Fristoe* pronounced and enforced a limitation on the BOP's discretion to deny the early release benefit. That limitation derives from the plain language of the statute and requires the BOP to look to convictions rather than sentencing enhancements or factors. The BOP heretofore has recognized only those limits which go to its discretion to grant early release. The limit on its discretion to deny the release benefit has consequently not been adequately implemented in the BOP's regulation or program statement. The BOP's decision to deny early release to Scroger on the basis of Section 7(b) of P.S. 5162.04 is contrary to that limitation.

However, the court emphasizes that the discretion granted to the Bureau of Prisons by the statute's language is otherwise quite broad. *See Martinez* at 1258.

Without question, the BOP has broad discretion over the entire drug treatment process within the federal corrections system, beginning with determining which inmates ever enter substance abuse programs. *Crabtree*, 100 F.3d at 666. Like the drug treatment placement decisions, decisions regarding whether to grant or deny eligible inmates a sentence reduction under § 3621(e) remain within the Bureau's discretion. *Crabtree*, at 671. While eligibility for early release under § 3621(e)(2)(B) is open to all prisoners who meet the statutory requirements, the statute vests the BOP with broad discretion to grant or deny sentence reductions to eligible prisoners[8]. *LaSorsa*, 2 F. Supp.2d at 553-55; *Jacks*, 114 F.3d at 984; *Pelissero v. Thompson*, 155 F. 3d at 474.

In the recent, well-written opinion of *LaSorsa v. Spears*, the United States District Judge cited portions of the legislative history of the early release program's enactment as part of the VCCLEA, and found that the provisions as introduced in both the House and Senate contained no limitations whatsoever on the BOP. He noted that the Senate amended its version of the bill to change the language in paragraph (B) from "prisoner" to "a prisoner convicted of a nonviolent offense" with no discussion. *See LaSorsa*, 2 F. Supp.2d at 554 *citing*, 139 Cong. Rec. S15030-70 (daily ed. Nov. 11, 1993). The judge further noted that the floor debates in the House

---

[8] As noted in *Jacks*, 114 F.3d at 984, by providing that a sentence "may be reduced," the statute gives the Bureau broad discretion to grant or deny reduction. This conclusion is reinforced by the preceding section of the enabling statute, which states that any prisoner who completes a drug treatment program "shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate." 18 U.S.C. § 3621(e)(2)(A).

of Representatives make it clear that substantial discretion was intended to vest in the BOP.[9]

The judge in *LaSorsa* stated his opinion that the BOP "certainly has, under the statute, the ability to deny early release to prisoners, the attendant circumstances of whose convictions involved weapons possession, . . . even though they were not convicted of a weapons offense." *Id.* at 555. The court reasoned:

> It is important to realize, however, that such considerations are proper not as an exercise in statutory interpretation by BOP—i.e., not as a matter of defining the phrase "convicted of a nonviolent offense" under § 924(c)(3)—but rather as an exercise of the discretion granted by the statute to determine who, among those convicted of a nonviolent offense, will be given early release.

LaSorsa, 2 F. Supp.2d at 556. The judge in *LaSorsa* noted that it is this distinction which some of the case law from other circuits fails to clearly articulate. *Id.*

---

[9] Both the chair and the ranking member of the Crime and Criminal Justice Subcommittee of the House Judiciary Committee stressed, in response to concerns over the early release program, that release was not guaranteed but was up to BOP. *See* 139 Cong. Rec. H8728 (daily ed. Nov. 3, 1993) (statement of Rep. Schumer) ("[T]his is not mandatory time off, it is an option, up to the prison authorities."), 139 Cong.Rec. H8724 (daily ed. Nov. 3, 1993) (statement of Rep. Sensenbrenner) ("[T]hat is in the discretion of the Bureau of Prisons on whether or not the prisoner's term ought to be reduce [sic] upon completion of the program."). *See* FN2 and further discussion of legislative history therein *LaSorsa*, 2 F. Supp.2d at 554.

This court disagrees with this dicta in *LaSorsa*. Here, petitioner is eligible under section 3621(e)(2)(B), but ineligible under the BOP's program statement creating an additional eligibility requirement. The BOP certainly has authority to create additional eligibility requirements, even ones not suggested by the statute which is largely silent as to criteria[10]. However, the BOP does not have authority to create an additional eligibility requirement which conflicts with the plain language of the statute. This court's holding is limited to invalidating the improper eligibility requirement.

The BOP's main argument here, as in *LaSorsa*, appears to be that because it has broad discretion under § 3621(e) to determine which prisoners are granted early release, it has the discretion to define the statutory terms however it believes will best serve its objectives. Considering this position, the judge in *LaSorsa* stated:

> This argument misses a crucial distinction. BOP does have broad discretion to determine which, among the class of "prisoners convicted of a nonviolent offense," will be granted early release and for how long (up to one year). BOP does not, however, have the "discretion" to interpret "prisoners convicted of a nonviolent offense" . . . in whatever way it chooses. These are statutory and regulatory terms whose meaning is quite clear, to the extent BOP has its own definitions of these

---

[10] Obviously, the regulation goes further than the statute in limiting BOP's ability to grant early release—e.g., prisoners who have prior convictions for certain violent crimes are apparently eligible under the statute, but made ineligible by regulation. *LaSorsa*, at 557.

> terms, these interpretations are not permissible exercises of discretion but are instead statutory interpretations by an agency to which this court owes some deference only if not contrary to the statute's clear meaning.

LaSorsa, 2 F. Supp.2d at 560.

The BOP's interpretation of § 3621(e)(2)(B) abrogating the statutory term "convicted" was not within its discretion and is entitled to no deference by this court.

RELIEF

The court concludes from the foregoing that petitioner was improperly denied eligibility for sentence reduction and is entitled to relief. This court does not have the authority to grant release under 18 U.S.C. § 3621(e)(2)(B). Instead, this matter must be referred to the Bureau of Prisons for reconsideration in accordance with this opinion. The BOP must determine whether there is any other basis for denying Scroger early release under § 3621(e)(2)(B) or whether release should be granted within its discretion. *Roussos*, 122 F.3d at 164. The respondent is prohibited from denying sentence reduction to Scroger solely on the basis of sentence enhancements. Respondent is granted until March 1, 1999 to reconsider Scroger's application for early release, and to file a written report with the court as to the outcome of that reconsideration.

IT IS THEREFORE BY THE COURT ORDERED that the BOP reconsider petitioner's request for a sentence reduction without consideration of petitioner's sentencing enhancement, in accordance with this opinion.

IT IS FURTHER ORDERED that this court will retain jurisdiction over this matter to insure that petitioner's sentence reduction is promptly and appropriately reconsidered.

IT IS FURTHER ORDERED that respondent reconsider Scroger for sentence reduction under 18 U.S.C. § 3621(e)(2)(B) before March 1, 1999 and file a status report no later than March 1, 1999, informing the court what action has been taken to comply with this order.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 99-3125, 99-3129, 99-3143

JAMES WARD, JIMMY SCROGER, AND
CHRISTOPHER LAMAR GUIDO,
PETITIONERS-APPELLEES

v.

J. W. BOOKER, WARDEN, RESPONDENT-APPELLANT

[Filed: April 4, 2000]

ORDER

Before: ANDERSON, MCWILLIAMS, and BALDOCK, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active

service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: [signature illegible]
Deputy Clerk

ORIGINAL

RESPONSE REQUESTED

NO. 00-18

Supreme Court, U.S.
FILED
NOV 20 2000
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

J. W. BOOKER, *Petitioner*,

v.

JAMES WARD, JIMMY SCROGER, AND CHRISTOPHER GUIDO, *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondents, James Ward, Jimmy Scroger, and Christopher Guido, by and through their court appointed counsel, Jill M. Wichlens, Assistant Federal Public Defender for the Districts of Colorado and Wyoming, respectfully request this Honorable Court for leave to proceed *in forma pauperis* in filing the attached Brief for Respondents in Opposition. In support of this request, Respondents state that undersigned counsel was appointed pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, by the United States Court of Appeals for the

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Tenth Circuit, and they are unable to retain counsel and pay for the costs attendant to the proceedings before this Honorable Court.

WHEREFORE, the Respondents, James Ward, Jimmy Scroger, and Christopher Guido, respectfully request that they be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

MICHAEL G. KATZ
Federal Public Defender
Jill M. Wichlens
JILL M. WICHLENS
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Counsel of Record for Respondents
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

J. W. BOOKER, Warden, *Petitioner*,

v.

JAMES WARD, JIMMY SCROGER, AND CHRISTOPHER GUIDO, *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

[illegible] 2 7 2000

MICHAEL G. KATZ
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QUESTION PRESENTED

Whether the Bureau of Prisons has discretion under 18 U.S.C. § 3621(e)(2)(B) to deny early release to all drug offenders who received an enhancement at sentencing pursuant to U.S.S.G. §2D1.1(b)(1), the enhancement applicable if a dangerous weapon "was possessed."

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OPINION BELOW

Respondents agree with petitioner's statement as to the opinions below.

JURISDICTION

Respondents agree with petitioner's statement as to jurisdiction.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Respondents agree with petitioner's statement of the statutory and regulatory provisions involved with the exception of petitioner's failure to set out the Bureau of Prisons Program Statement issued to implement the relevant regulation, 28 C.F.R. §550.58(a)(1)(vi)(B) (1997). That Program Statement provides in pertinent part:

> 7. OFFENSES THAT AT THE DIRECTOR'S DISCRETION SHALL PRECLUDE AN INMATE'S RECEIVING CERTAIN PROGRAM BENEFITS. For certain Bureau programs, such as early release pursuant to 18 U.S.C. § 3621(e) and placement in Intensive Confinement Centers, an inmate may be denied program benefits if he or she was convicted of an offense listed in either this section or Section 6. If an inmate is denied the benefit of such a program, staff must carefully describe the basis for the denial. For example, if an inmate is convicted of an offense listed in this section, the inmate shall be denied a program benefit because he or she committed an offense identified at the Director's discretion, rather than a crime of violence.
>
> As an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain Bureau program benefits.
>
> Inmates whose current offense is a felony that:
>
> - has an element, the actual, attempted, or threatened use of physical force against the person or property of another, or

- involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device), or

- by its nature or conduct, presents a serious potential risk of physical force against the person or property of another, or

- by its nature or conduct involves sexual abuse offenses committed upon children.

Thus, for an inmate to receive Bureau program benefits such as those mentioned above, he or she must not be convicted of an offense listed in this section or in Section 6.

* * * * *

b. Criminal Offenses with a Specific Offense Characteristic Enhancement. Convictions for an offense listed below, like those listed in Section 7.a., may or may not satisfy the standard listed in the introductory portion of Section 7.

At the time of sentencing, the court makes a finding of whether the offense involved the use or threatened use of force, and this finding is reflected in the PSI section entitled "Offense Computation," subsection entitled "Specific Offense Characteristics." This subsection references a particular U.S. Sentencing Guideline that provides for an increase in the Total Offense Level if the criminal violation was committed with force.

> Example: Section 841 of Title 21, United States Code makes it a crime to manufacture, distribute, or possess with the intent to distribute drugs. Under the Sentencing Guidelines (§ 2D1.1 and § 2D1.11), the defendant could receive an increase in his or her base offense level because of a "Specific Offense Characteristic" (for example, if a dangerous weapon was possessed during commission of the offense), the court would increase the defendant's base offense level by two levels. This particular "Specific Offense Characteristic" (possession of a dangerous weapon during the commission of a drug offense) poses a serious potential risk that force may be used against persons or property. Specifically, as noted in the U.S. Sentencing Guidelines §2D1.1, application note 3, the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. Accordingly, an inmate who was convicted of manufacturing drugs, (21 U.S.C. § 841) and received a two-level enhancement for possession of a firearm has been convicted of an offense that will preclude the inmate from receiving certain Bureau program benefits.

Bureau of Prisons Program Statement 5162.04 at 8-9, 11-12 (1997).

STATEMENT OF THE CASE

Respondents James Ward, Jimmy Scroger and Christopher Guido were convicted of felony drug offenses in unrelated cases. At sentencing, each received an upward adjustment to his offense level pursuant to U.S.S.G. §2D1.1(b)(1). Section 2D1.1(b)(1) increases the defendant's sentence in a drug case "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. §2D1.1(b)(1). Under Tenth Circuit law, the enhancement may be applied even if it was not the defendant who possessed the weapon. See United States v. Smith, 131 F.3d 1392, 1400 (10th Cir. 1997) (quoting United States v. McFarlane, 933 F.2d 898, 899 (10th Cir. 1991) ("Personal possession of a firearm ... is not necessary [under §2D1.1(b)(1)] ... The sentencing court may 'attribute to a defendant weapons possessed by his co-defendants if the possession of weapons was known to the defendant or reasonably foreseeable by him.'"), cert. denied, 118 S.Ct. 1109 (1998).

The specific facts of each respondents' receipt of a §2D1.1(b)(1) enhancement are as follows: In respondent Ward's case, the weapons in question were found in a safe in Ward's roommate/co-defendant's bedroom. Ward Doc. 13: Opinion of the district court, reported at 38 F.Supp. 2d 1258 (D. Kan. 1999). In respondent Scroger's case, the weapons in question were found in a residence at which Scroger and another person were present. Scroger Doc. 8: BOP Answer and Return filed 10/8/98. In respondent Guido's case, the enhancement was based on a firearm found on Guido's person. Guido Doc. 9: Opinion of the district court, reported at 37 F.Supp.2d 1289 (D. Kan. 1999).

While in custody, each respondent successfully completed the residential phase of the BOP "Comprehensive Drug Abuse Treatment Program." Ward op. at 2; Scroger Doc. 10:

Opinion of the district court, reported at 39 F.Supp.2d 1296 (D. Kan. 1999); Guido op. at 2. Each sought a one-year reduction in sentence pursuant to 18 U.S.C. § 3621(e)(2)(B), which provides that "[t]he period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve." Each respondent was denied early release based on his receipt at sentencing of an adjustment pursuant to U.S.S.G. §2D1.1(b)(1). Ward op. at 3-4; Scroger op. at 2-3; Guido op. at 2-3.

Pursuant to 28 U.S.C. § 2241, each respondent filed a pro so petition for relief in the United States District Court for the District of Kansas.[1] Ward, Scroger, and Guido op's at 1. The district court granted relief in each case and ordered petitioner to reconsider respondents' requests for a sentence reduction without regard to their receipt of sentencing adjustments pursuant to §2D1.1(b)(1). Id.

Petitioner complied with the district court's order, found no other basis for denying respondents' requests, and reduced respondents' sentences by one year. Id. Each respondent has now completed the custodial portion of his sentence and is on supervised release.

Petitioner appealed the district court orders directing reconsideration of respondents' requests. The United States Court of Appeals for the Tenth Circuit affirmed the district court's decision in each case. See Booker v. Ward, 202 F.3d 1249 (10th Cir. 2000). The Tenth Circuit denied petitioner's request for panel rehearing and for rehearing en banc.

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[1] The district court found that each respondent had either exhausted his administrative remedies before filing a § 2241 petition or that exhaustion would be futile. Ward op. at 6-7; Scroger op. at 3; Guido op. at 3-5.

ARGUMENT

1. It is a program statement, not a regulation, that disqualifies inmates such as respondents from early release.

Petitioner argued on appeal that its latest method for disqualifying drug offenders with weapon enhancements from early release, by way of 28 C.F.R. §550.58(a)(1)(vi)(B), is entitled to deference because "the new BOP rule, unlike the old program statement, is a formal agency regulation published in the Federal Register and Code of Federal Regulations." Petitioner's Opening Brief on Appeal at 14. This argument was based on the mistaken assumption that it is the new *regulation* that disqualifies drug offenders with §2D1.1(b)(1) enhancements rather than the new *program statement*. In fact, it is the new program statement, not the new regulation, that disqualifies such offenders. The new regulation does not even address §2D1.1(b)(1). It provides instead for the disqualification of inmates whose current offense "involved the carrying, possession, or use of a firearm." 28 C.F.R. § 550.58(a)(vi)(B) (1997).

The new program statement, by contrast, unequivocally disqualifies any felony drug offender who "received a two-level enhancement for possession of a firearm." P.S. 5162.04 at 12 (1997). The new program statement does not distinguish between inmates who received a §2D1.1(b)(1) adjustment because they personally possessed a firearm, and inmates who received a §2D1.1(b)(1) adjustment because their co-defendant possessed a firearm. Thus, it is the program statement, not the regulation, that disqualifies inmates such as respondents.

That it is the new program statement that disqualifies §2D1.1(b)(1) recipients, not the new regulation, is further shown by the following example: A drug offender receives a §2D1.1(b)(1) enhancement at sentencing based on his co-defendant's possession of a gun.

Following drug treatment, the inmate requests early release. Under the new regulation, the inmate's case manager must decide whether the inmate's offense involved the carrying, possession, or use of a firearm. Because the *inmate's* offense did not involve a firearm, the answer would be no, and the inmate would not be disqualified.

Under the new program statement, however, the case manager would not have to decide whether the *inmate's* offense involved a firearm. The fact that the inmate received a §2D1.1(b)(1) adjustment, for whatever reason, would end the inquiry.[2]

2. The program statement at issue here is invalid because it conflicts with the regulation under which it was issued.

It is well established that, even if a statute gives an agency discretion over a matter, the agency can limit its discretion by promulgating regulations on the subject. See, e.g., Center for Auto Safety v. Dole, 828 F.2d 799, 806 (D.C. Cir. 1987), vacated on other grounds, 896 F.2d 1532 (D.C. Cir. 1988) ("[A] court will require an agency to follow the legal standards contained in its own regulations despite the fact that a statute has granted the agency discretion in the matter.")

In this case, petitioner's program statement conflicts with its regulation. The regulation disqualifies inmates based on elements of, or conduct underlying, the *inmate's* offense. The program statement, on the other hand, allows disqualification based on conduct underlying a *third party's* offense. This inconsistency is unlawful and requires invalidation of the program statement under which respondents were denied early release. In the alternative, the program

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[2] The stated basis for disqualifying each respondent in this case was the program statement, not the regulation. See Ward op. at 28; Scroger op. at 29; Guido op. at 26.

statement is invalid as applied to respondents' Ward and Scroger because they did not personally possess the weapons upon which the enhancement of their sentences was based.

Because the Tenth Circuit correctly affirmed the district court's orders in this case, the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Federal Public Defender

Jill M. Wichlens

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NO. ____

IN THE

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OCTOBER TERM, 1999

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v.

JAMES WARD, JIMMY SCROGER, AND CHRISTOPHER GUIDO, *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

AFFIDAVIT OF SERVICE

Jill M. Wichlens, Federal Public Defender for the Districts of Colorado and Wyoming, hereby attests that pursuant to Supreme Court Rule 29, the preceding Brief for Respondents in Opposition was served on counsel for the Petitioner by enclosing a copy of these documents in an envelope, first-class postage prepaid and addressed to:

Seth P. Waxman
Solicitor General of the United States
Room 5614
Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

It is further attested that the envelope was deposited with the United States Postal Service, Denver, Colorado 80201, on November 20, 2000, and all parties required to be served have been served.

Jill M. Wichlens

JILL M. WICHLENS
Assistant Federal Public Defender
Counsel of Record for Respondents
1099 18th Street, Plaza Tower #300
Denver, Colorado 80202
(303) 294-7002

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 20th day of November, 2000.

Janice Kuelper

Janice Kuelper
Notary Public

My Commission Expires:

January 27, 2001

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

J. W. BOOKER, *Petitioner*,

v.

JAMES WARD, JIMMY SCROGER, AND CHRISTOPHER GUIDO, *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

AFFIDAVIT OF MAILING

Jenine Jensen, Assistant Federal Public Defender, a member of the Bar of this Court, hereby attests that pursuant to Supreme Court Rule 29, the preceding Brief for Respondents in Opposition was enclosed in an envelope, first-class postage prepaid and addressed to:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

It is further attested that the envelope was deposited with the United States Postal Service, Denver, Colorado 80201, on November 20, 2000, and all parties required to be served have been served.

JENINE JENSEN
Assistant Federal Public Defender

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this 20th day of November, 2000.

Janice Kuelper
Notary Public

My Commission Expires:

January 27, 2001